

Transfers in Fraud of Creditors, Ohio Law and the Uniform Act

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American law of transfers in fraud of creditors traces its origin to the Statute of 13 Elizabeth.¹ This enactment, neither the first nor the last of the English statutes,² was adopted in whole or in part by a number of the American states.³ It is said to have been only a statutory declaration of English common law,⁴ and as such to constitute a part of our English legal heritage.⁵

Ohio's contribution to this branch of the law rests mainly upon two statutes⁶ or groups of statutes. The older of these is Ohio Gen-

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¹ STAT. 13 ELIZ. c. 5 (1571); GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES § 61b n. (1940).

² See 50 EDW. III, c. 6 (1376); 3 HEN. VII, c. 4 (1487) (fraudulent gifts of chattels); 27 ELIZ., c. 4 (1585); 39 ELIZ., c. 18, § 31 (1597) (protecting subsequent purchasers of land); Voluntary Conveyance Act, 1893, 56 & 57 VICT., c. 21; Law of Property Act, 1925, 15 GEO. V, c. 20, §§ 172, 173 (present English statute); BIGELOW, FRAUDULENT CONVEYANCES 11-14 (rev. ed. 1911).

³ BUMP, FRAUDULENT CONVEYANCES 8 (4th ed. 1896).

⁴ See *Hoffman, Burneston & Co. v. Mackall*, 5 Ohio St. 124, 133 (1855); *Blumenthal v. Blumenthal*, 35 A. 2d 831 (Del. Ch. 1944). Cf. MAY, FRAUDULENT CONVEYANCES 6 (2d ed. 1887).

⁵ *Hall & Farley v. Alabama Terminal & Imp. Co.*, 143 Ala. 464, 39 So. 285 (1905); BIGELOW, *op. cit. supra* note 2, at 14, 23. In the Northwest Territory a law adopted in 1795 from the Virginia code provided that Acts of the British Parliament, enacted prior to the fourth year of the reign of King James the First, in aid of the common law, should be the rule of decision. 2 REV. STAT. c. 64 (Chase 1833). This law was later modified and repealed. 1 REV. STAT. c. 89, § 4; c. 100, § 23; c. 131, § 7; c. 70, § 2; c. 105, § 2. A later statute of similar purpose, enacted on February 14, 1805, was repealed on January 2, 1806. 1 REV. STAT. c. 105, § 1; c. 122 (Chase 1833); SWAN, REV. STAT. 435 n. (Derby ed. 1854); SWAN AND CRITCHFIELD, REV. STAT. 660 n. (1860).

⁶ Other statutes are: OHIO GEN. CODE ANN. §§ 8404-8406 (transfers of title under the Sales Act); 8617 (trust deeds); 8619 (loans of goods and chattels); 8560 (mortgage of chattels); 9394, 9400 (insurance policies); 10502-6 (dower); 10290, 10291, 11819 (attachments); 10510-49, 50 (sales by executors); 11092 n. 29 (insolvent estates); 11102-11103-1 (sales in bulk); 11224 (limitation of actions); 11781, 11782 (proceedings in aid of execution); 11894 (appointment of receivers); 13125, 13123 (penal code) (1938).

eral Code Section 8618, enacted originally in 1810⁷ and described as being coextensive with the Statute of Elizabeth.⁸ Next are Sections 11104-11107, first enacted in 1859 as an integral part of the law on administering assignments for the benefit of creditors, which authorize the appointment of a receiver to recover illegal preferences and fraudulent conveyances "for the equal benefit of creditors."⁹

With the variation in doctrine produced by divergent interpretations of state statutes, need arose for uniform legislation on the subject of fraudulent conveyances and for clarification as well as change in local rules. To these ends¹⁰ the Uniform Fraudulent Conveyance Act was drafted—approved by the Commissioners on Uniform State Laws in 1918. It was not intended that the Act

⁷ 8 Ohio Laws 216 (1810) (Section 2 of the Statute of Frauds). While the statute provides that a conveyance in fraud of creditors "shall be utterly void and of no effect," such a conveyance is usually held to be valid as between the parties. *Burgett v. Burgett*, 1 Ohio 469 (1824); *Webb v. Brown*, 3 Ohio St. 247 (1854); *Pride v. Andrew*, 51 Ohio St. 405, 38 N. E. 84 (1894). This is the general rule. *BUMP, op. cit. supra* note 3, § 432; *BIGELOW, op. cit. supra* note 2, at 466.

⁸ *Brice v. Myers*, 5 Ohio 121, 123 (1831); *Huwe v. Knecht*, 10 Ohio App. 487, 31 Ohio C. A. 305 (1919).

⁹ 56 Ohio Laws 235 (1859). OHIO GEN. CODE ANN. § 11104 (1938): "... a receiver *may* be appointed who shall take charge of *all* the assets of such debtor or debtors, including the property so sold, conveyed, transferred, mortgaged, or assigned, and also administer all the assets of the debtor or debtors for the *equal benefit* of the creditors of the debtor or debtors in proportion to the amount of their respective demands, including those which are unmatured." (Emphasis supplied.) *Shorten v. Woodrow*, 34 Ohio St. 645, 653 (1878): "It was not the object of this provision of the statute to enlarge the class of transfers or conveyances, which Section 2 of the Statute of Frauds [section 8618] declares 'shall be deemed utterly void and of no effect.' Its purpose was to supply a new remedy to creditors, by authorizing the fraudulent conveyance or transfer to be converted into an assignment at the suit of a creditor, and the fund to be distributed, if the creditors so elect, in the same manner as if the debtor had formally assigned the property conveyed for the equal benefit of all his creditors." Although sections 11104-11106 are directly concerned in this investigation, it is section 8618 which is ultimately involved. See *Carruthers v. Kennedy*, 121 Ohio St. 8, 166 N.E. 801 (1929); *Loudenback v. Foster*, 39 Ohio St. 203 (1883).

¹⁰ "There are few legal subjects where there is a greater lack of exact definition and clear understanding of boundaries

"The confusions and uncertainties of the existing law which have been referred to are due primarily to three things: First, the absence of any well recognized, definite conception of insolvency. Second, failure to make clear the persons legally injured by a given fraudulent conveyance. Third, the attempt to make the Statute of Elizabeth cover all conveyances which wrong creditors, even though the actual intent to defraud does not exist." 9 UNIFORM LAWS ANN., PREFATORY NOTE 325, 326 (1942). 1 GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES 93 (1940). Twenty states have adopted the Act, 9 UNIFORM LAWS ANN. 109 (Supp. 1947). Its essential features are contained in section 67d of the Bankruptcy Act. 11 U.S.C. § 107 d (1946); COLLIER, BANKRUPTCY § 67.29 (14th ed. 1942).

should revolutionize the law. In the main it was to be a restatement of its English predecessor and to be declaratory of existing law.¹¹ "The great benefit from the enactment of the Statute," the Commissioners wrote, "will be to remove some confusion of legal thought, which now renders the law on many points uncertain in all jurisdictions, and substitute for these uncertain rules both certain and uniform ones."¹²

A discussion of these objectives of the Uniform Act as applied to Ohio Law is the purpose of this paper.¹³ The method pursued will be to consider various problems of fraudulent conveyances, their general manner of solution, rules applicable under Ohio statutory and case law, and the proposals of the Uniform Act. For reference purposes the sectional order of the Uniform Act will be followed. By this means Ohio law can be compared to general doctrine, and the possible worth of any changes offered by the Uniform Act can be appraised.

A MATTER OF DEFINITIONS

Assets

The statute of 13 Elizabeth was originally designed as a revenue measure to recover for the benefit of the English Crown one-half the value of property fraudulently conveyed by debtors. The remainder went to aggrieved creditors.¹⁴ The statute referred to "lands, tenements, hereditaments, goods and chattels," that is, to

¹¹ *Dorrington v. Jacobs*, 213 Wis. 521, 252 N.W. 307 (1934); *Westminster Savings Bank v. Sauble*, 183 Md. 628, 632, 39 A. 2d 862 (1944); *General Kontrolar Co. v. Allen*, 124 F. 2d 123 (C.C.A. 6th 1942); *In re Maxwell Sheraton, Inc.*, 46 F. Supp. 680 (S.D.N.Y. 1942), *aff'd*, 137 F. 2d 163 (C.C.A. 2d 1943).

¹² "The Uniform Law, however, is by no means comprehensive. Certain disputes it closes, and closes well. Others it does not mention. But its saving clause . . . leaves of force, as to any situation not specifically covered, 'the rules of law and equity,' etc. It follows that each State which adopts the Uniform Law leaves in effect such principles as her courts have established save as the Act may plainly cut across the line. Consequently one must deal with a mixture of statute and case law, even in a State where the Uniform Law prevails. So far as express provisions go, not only is the Uniform Law an excellent model, but it furnishes good heads of discussion." 9 *UNIFORM LAWS ANN.*, PREFATORY NOTE 325, 326 (1942). GLENN, *op. cit. supra* note 10, at 101.

¹³ On December 12, 1947 the Committee on Uniform State Laws of the Ohio Bar Association, approved the Uniform Fraudulent Conveyance Act for adoption by the Ohio Legislature. This research was undertaken at the instance of the Committee's former chairman, Mr. James M. Hengst, and was continued with the approval of its present chairman, Mr. Howard Dresbach. Its intent is to be objective as distinguished from partisan.

¹⁴ ". . . the one moiety whereof to be to the Queen's majesty, her heirs and successors, and the other moiety to the parties grieved." *STAT. 13 ELIZ.*, c. 5, § 3 (1571). See interesting historical discussion: 1 GLENN, *op. cit. supra* note 1. Similar language is contained in *STAT. 27 ELIZ.*, c. 4, § 3 (1585).

creditor assets within the meaning of existing law. Money, bonds and choses in action were not originally included. Subsequently with the shift of emphasis in business property from lands and chattels to intangibles, the scope of assets was broadened.¹⁵

Ohio General Code Section 8618 preserves the older order of enumeration used in its English predecessor by referring to "lands, tenements, hereditaments, rents, goods, or chattels." Section 11104, however, is drafted in terms of a preferential or fraudulent "sale, conveyance, transfer, mortgage or assignment made or judgment procured"; and provides that the receiver appointed thereunder shall "take charge of all the assets of such debtor or debtors, including the property so sold, [or] conveyed."

Contrasted with this phrasing, the Uniform Act defines assets in terms of a debtor's nonexempt property.¹⁶ This device avoids the limitation of a specific enumeration, but necessitates a reference to state exemption laws. A creditor's right to his debtor's assets is cast in terms of alienability of property, with especial emphasis upon availability through judicial proceedings.¹⁷

Both of the Ohio statutes as well as the Uniform Act seem to proscribe fraudulent transfers of equitable interests in land.¹⁸ Choses in action should come within the provisions of Section 11104, subject to defenses contained in Section 11105. They are not within the precise terms of Section 8618, and such wording elsewhere has caused difficulty.¹⁹ But a liberal interpretation of the words "goods and chattels," used in their generic sense, or the subjection in fact of choses to legal process because of statutes or otherwise, has usually prevailed.²⁰

¹⁵ 1 GLENN, *op. cit. supra* note 1, § 135; MAY, *op. cit. supra* note 4 at 17-18; 1 MOORE, FRAUDULENT CONVEYANCES 20 (1908); 87 Am. St. Rep. 488 (1901); 1 & 2 VIC., c. 110, XII (1838).

¹⁶ Section 1: "In this act 'assets' of a debtor means property not exempt from liability for his debts. To the extent that any property is liable for any debts of the debtor, such property shall be included in his assets." 9 UNIFORM LAWS ANN. 327 (1942). BANKR. ACT § 67d (1), 11 U. S. C. § 107d(1) (1946); *Carter v. Carter*, 55 Cal. App. 2d 13, 130 P. 2d 186 (1942); *Simunek v. Millay*, 46 S. D. 620, 195 N. W. 507 (1923); *People's State Bank v. Karlen*, 44 S. D. 82, 182 N. W. 531 (1921). *Re* "good will" see *Maitland v. Slutsky*, 281 Mich. 669, 275 N. W. 726 (1937); *Snyder Mfg. Co. v. Snyder*, 54 Ohio St. 86, 43 N. E. 325 (1896); 1 GLENN, *op. cit. supra* note 1, § 144. *Re* powers of appointment RESTATEMENT, PROPERTY § § 328, 329 (1940).

¹⁷ 1 GLENN, *op. cit. supra* note 1, § § 138, 139.

¹⁸ *Brown v. Cutler*, 8 Ohio 142 (1837). See *Coggshall v. Marine Bank*, 63 Ohio St. 88, 57 N. E. 1086 (1900). 1 GLENN, *op. cit. supra* note 1, § 152.

¹⁹ MAY, *op. cit. supra* note 4, at 18; BUMP, *op. cit. supra* note 3, § 216.

²⁰ *Hall & Farley v. Alabama Terminal & Imp. Co.*, *supra* note 5; *Bryans v. Taylor, Wright* 245 (Ohio 1833); *Newark v. Funk & Bro.*, 15 Ohio St. 462 (1864).

Should the Ohio legislature replace Section 8618 with the Uniform Act, the change in defining assets would have the beneficial effect of conforming language to practice. Since Ohio exemption statutes already apply,²¹ this feature of the definition would not be new.

Conveyances

Section 3 of the Statute of Elizabeth penalizes in classic terms "all and every the parties to such feigned, covinous or fraudulent feoffment, gift, grant, alienation, bargain, conveyance, bonds, suits, judgments, executions and other things before expressed." The wording of the Ohio statutes is equally specific. Section 8618 reads: "Every gift, grant or conveyance . . . and every bond, judgment or execution." Section 11104 includes: "A sale, conveyance, transfer, mortgage or assignment made, or judgment procured by him or them to be rendered, in any manner, with intent to hinder, delay or defraud creditors." The Uniform Act is no less explicit: "Every payment of money, assignment, release, transfer, lease, mortgage or pledge of tangible or intangible property, and also the creation of any lien or incumbrance."²²

Among these phrasings there is little to choose, but a difficulty remains. Section 11104 is part of our code provisions regarding assignments for benefit of creditors.²³ Hence a general assignment

²¹ OHIO GEN. CODE § § 11721, 11725, 11737 (1938); *Tracy v. Cover*, 28 Ohio St. 61 (1875). Cf. *Gledhill v. Walker*, 143 Ohio St. 381, 55 N.E. 2d 647 (1944) (transfers of unclaimed homesteads). See 1 GLENN, *op. cit. supra* note 1, § 171 n. As to insurance OHIO GEN. CODE § § 9394, 9395, 9397, 9398, 11722 (1938) (beneficiary funds); *Lytle v. Baldinger*, 86 Ohio St. 1, 95 N. E. 389 (1911). Cf. 19 OHIO JUR. 734 (1931); *In re Weick*, 2 F. 2d 647 (1924); 9 U. OF CIN. L. REV. 498 (1935).

²² An encumbrance has been treated as a "conveyance." *Service Mortgage Corp. v. Welson*, 293 Mass. 410, 200 N. E. 278 (1936). Likewise a consignment of goods. *Best Made Clothing Co. v. O'Brien*, 262 N. Y. Supp. 56, 145 Misc. 787 (N. Y. City 1932). So, also, taking title in donee's name. *Sweney v. Carroll*, 118 N. J. Eq. 208, 178 Atl. 539 (Ch. 1935); *Haggerty v. Wilmington Trust Co.*, 194 Atl. 134 (Del. Ch. 1934). Cf. *Dorrington v. Jacobs*, 213 Wis. 521, 252 N. W. 307 (1934); and where proceeds (money or equivalent) from mortgage loan were paid to debtor's wife, *Leifer v. Murphy*, 267 N. Y. Supp. 701, 149 Misc. 455 (Sup. Ct. 1933); the creation of a joint bank account, *Carter v. Carter*, *supra* note 16. As to renunciation of a devise see 27 VA. L. REV. 936-947 (1941).

²³ Intent to defraud must be shown. *Detroit, T. & I. R. R. v. Wright*, 48 Ohio App. 305, 193 N. E. 630 (1933). Cf. *Loudenback v. Foster*, 39 Ohio St. 203 (1883); *Barber v. Coit*, 144 Fed. 381 (1906). It was once held that a gratuitous conveyance from a husband to his wife, being void in law and in equity for lack of capacity, was not within this statute so as to inure to the benefit of creditors generally. *Fowler v. Trebein*, 16 Ohio St. 493 (1866). *Re taking title in another's name* see *Bloomington v. Stein*, 42 Ohio St. 168, 171 (1884); *Beebe v. Canda*, 18 Ohio C. C. (N. S.) 104 (1911). Cf. *Mason v. Eichels*, 8 Ohio Dec. Rep. 436 (1882); *BUMP*, *op. cit. supra* note 3, § § 217, 218;

is not necessarily a fraudulent conveyance.²⁴ Further, under an earlier form of Section 8618 a general assignment was held not to be fraudulent per se.²⁵ On the other hand Section 4 of the Uniform Act provides that a conveyance by an insolvent is fraudulent regardless of intent, if it is made "without a fair consideration"²⁶—a description which clearly fits a general assignment. Also, while except in Massachusetts²⁷ the distinction between general assignments and fraudulent conveyances is firmly rooted, it has been well said that "originally the general assignment only escaped being treated as a fraudulent conveyance by main strength."²⁸ Consequently the enactment of Section 4 as worded might have a disturbing effect upon the validity of assignments for benefit of creditors.

Because of the doubt created by the phrasing of Section 4,²⁹ it has been suggested³⁰ that the definition of a conveyance in the Act should be supplemented by the words: "except when given to a trustee for the benefit of all unsecured creditors." This qualification was added by the Washington legislature when it adopted the Act in 1945.³¹

Creditors

By combining the words "creditors and others" the statute of 13 Elizabeth extended its benefits beyond persons who could strictly be classed as creditors. Both this statute and its American counterparts have been liberally construed to include "all persons who have a valid cause of action."³² It is immaterial whether the demand

1 GLENN, *op. cit. supra* note 1, § 210; RESTATEMENT, TRUSTS § 440 (1935). See *O'Hara v. Bell*, 8 Ohio N.P. (N.S.) 352, 20 Ohio Dec. (N.P.) 55 (1909).

²⁴ Even though the assignor intends to defraud. *Floyd & Co. v. Smith*, 9 Ohio St. 546 (1859); *Thomas v. Talmadge*, 16 Ohio St. 433 (1866).

²⁵ *Bancroft & Caffee v. Blizzard*, 13 Ohio 30 (1844); *Hoffman Burneston & Co. v. Mackall*, 5 Ohio St. 124 (1855); *Conkling & Shepherd v. Coonrod & Crum*, 6 Ohio St. 611 (1856).

²⁶ See page 597 *infra* for text of the Act. The definition of a "fair eration" in Section 3 of the Act is set out *infra* page 592.

²⁷ Hall, *Voluntary Assignments and Insolvency in Massachusetts*, 8 HARV. L. REV. 265 (1894); GLENN, LIQUIDATION §§ 105-108 (1935).

²⁸ GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES § 208 (1940).

²⁹ Under Section 3a(1) and (4) of the Bankruptcy Act, fraudulent conveyances and general assignments are treated separately as acts of bankruptcy. Under the Act of 1867, a general assignment was not listed as an act of bankruptcy, but by construction it was considered to be a fraud upon the Act. *Platt v. Preston*, 19 Fed. Cas. 847, No. 11,219 (S.D.N.Y. 1876); COLLIER, BANKRUPTCY § 3.401 (14th ed. 1940).

³⁰ Bridgman, *Uniform Fraudulent Conveyance Act in Minnesota*, 7 MINN. L. REV. 530, 532 (1923).

³¹ WASH. REV. STAT. ANN. § 5854-40 (Supp. 1945).

³² 1 MOORE, *op. cit. supra* note 15, at 198; BUMP, *op. cit. supra* note 3, §§ 502, 503. Protection for purchasers of land was furnished in STAT. 27 ELIZ., c. 4 (1585).

sounds in damages for tort or arises out of breach of contract,³³ provided the action is enforceable by legal process.³⁴ Thus an assignee of a creditor³⁵ may sue, and in proper instances the right is extended to a debtor's personal representative.³⁶

The Ohio statutes are content to use the word, "creditors",³⁷ but a similarly liberal construction has been employed.³⁸ Creditors and subsequent purchasers may attach a conveyance;³⁹ but a stranger may not;⁴⁰ nor may a creditor who holds ample security;⁴¹ nor one against whom the statute of limitations had run when the conveyance was made.⁴² The right of a debtor's assignee for creditors and

³³ "Every person having a legal demand against another, is his creditor, whether that demand is one sounding in damages, or one that comes under a contract." *Harris v. Harris's Ex'r*, 23 Gratt. 737, 764 (Va. 1873). See *American Surety Co. v. Marotta*, 287 U.S. 513 (1933) (surety). *Pierce v. United States*, 255 U.S. 398 (1921) (liability to a fine). Cf. *State v. Malecky*, 202 Iowa 307, 210 N.W. 121 (1926). For a discussion of this case see 12 *IOWA L. REV.* 196 (1926); 16 *CALIF. L. REV.* 254 (1916); 33 *HARV. L. REV.* 866 (1920); 18 *VA. L. REV.* 203 (1931). In some states a tort claimant is classed as a subsequent creditor. 1 *MOORE, op. cit. supra* note 15, at 200-202; 14 *Am. St. Rep.* 745 (1890). Cf. 1 *GLENN, op. cit. supra* note 28, at 339, 340.

³⁴ *BIGELOW, op. cit. supra* note 2, at 152-157.

³⁵ *Anderson v. Maltby*, 2 Ves. 244, 255 (1739); *Martin v. Pewtress*, 4 Burr. 2478 (1769); *In re Downing*, 201 Fed. 93 (1912); *Moore v. U. S. One Stave Barrel Co.*, 238 Ill. 544, 87 N. E. 536 (1909); *Blake v. Griswold*, 104 N. Y. 613, 11 N. E. 137 (1887). A sheriff on execution process, *Gale v. Williamson*, 8 M. & W. 405 (1841); *Scarfe v. Hallifax*, 7 M. & W. 288 (1840). 1 *MOORE, op. cit. supra* note 15, at 205-207.

³⁶ 1 *MOORE, op. cit. supra* note 15, at 208, 765. See *Hurwitz v. Hurwitz*, 136 F. 2d 726 (1943); 45 *YALE L. J.* 510 (1936); 57 *HARV. L. REV.* 253 (1943). Cf. *MAY, op. cit. supra* note 4, at 525; 1 *GLENN, op. cit. supra* note 28, § 104n.

³⁷ OHIO GEN. CODE §§ 8618, 11104, 11106 (1938).

³⁸ "He is a creditor who has a right by law to demand and recover of another a sum of money on any account whatever." *Ilkovis v. Conrad*, 16 Ohio C. C. (N.S.) 389 (1905); *Western Bank & Trust v. Mitchell*, 44 Ohio App. 552, 186 N. E. 517 (1932) (holder of notes for money loaned); *Boies v. Johnson*, 1 Ohio C. C. (N.S.) 451 (1903) (surety on bond); *Stivens v. Summers*, 68 Ohio St. 421, 67 N. E. 884 (1903) (surety on bond); *McVeigh v. Ritenour*, 40 Ohio St. 107 (1883) (breach of promise to marry); *Rose v. Rose*, 34 Ohio App. 89, 169 N. E. 827 (1929) (conveyance of personalty to avoid possible alimony decree).

³⁹ *Burgett v. Burgett*, 1 Ohio 469 (1824). For conditions governing attachment by subsequent creditors see notes 220-223 *infra*.

⁴⁰ *Wright v. Snell*, 22 Ohio C. C. 86, 93, 12 Ohio C. D. 308 (1901); *Jay v. Squire*, 7 Ohio N. P. 345, 5 Ohio Dec. 318 (1896). See *Brice v. Myers*, 5 Ohio 121 (1831).

⁴¹ *Stephenson v. Donahue*, 40 Ohio St. 184 (1883); *City Trust & Savings Bank v. Weaver*, 68 Ohio App. 323, 22 Ohio Op. 529 (1941); *MAY, op. cit. supra* note 4, at 163, 164; *BIGELOW, op. cit. supra* note 2, at 188.

⁴² *Jones v. Lehman*, 15 Ohio Dec. (N.P.) 541 (1905). *Re* statute of limitations as defense to the debt see 1 *MOORE, op. cit. supra* note 15, at 196.

of his personal representative is expressly provided.⁴³

The Uniform Act defines a creditor as "a person having a claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent." This is a definition of creditors as distinguished from a determination of whether or not a claim must be matured, be reduced to judgment, or must create a lien before relief will be granted—problems to be discussed subsequently. It is not controlling that a claim is secured.⁴⁴ Actions for fraud or deceit,⁴⁵ for malicious prosecution,⁴⁶ or for injury in an automobile accident⁴⁷ are included, as are those for breach of promise to marry.⁴⁸ Such claims date from the commission of the wrongful act rather than from the entry of judgment.⁴⁹ So, also, a surety is a

⁴³ OHIO GEN. CODE § 11106 (1938) (assignees for creditors). Ohio General Code Sections 10510-49, 50 (personal representatives) is limited to sales of real estate fraudulently conveyed by an insolvent, if needed to pay debts of the estate. *McCall v. Pixley*, 48 Ohio St. 379, 27 N. E. 887 (1891); *Hoffman v. Kiefer*, 19 Ohio C. C. 401, 10 Ohio C. D. 304 (1899). But not if the rights of a bona fide purchaser intervene. *Doney v. Clark*, 55 Ohio St. 294, 45 N. E. 316 (1896). If not needed to pay debts of the estate see *Benjamin v. LeBaron*, 15 Ohio 517 (1846); *Lockwood v. Krum*, 34 Ohio St. 1, 10 (1877); *Kihlken v. Kihlken*, 59 Ohio St. 106, 51 N. E. 969 (1898); *Baker v. Hall*, 9 Ohio N. P. (N. S.) 396, 20 Ohio Dec. (N. P.) 445 (1910). *Re trustee in bankruptcy*. BANKR. ACT § 70e, 11 U. S. C. § 110e (1946).

⁴⁴ And so includes a secured creditor. *Marshall & Ilsley Bank v. Stepke*, 228 Wis. 39, 279 N. W. 625 (1938; [1939] Wis. L. REV. 102).

⁴⁵ *Myer, Conner & Co. v. United Founders' Corp.*, 265 N.Y. Supp. 289, 238 App. Div. 642 (1st Dep't 1933).

⁴⁶ *Oliphant v. Moore*, 155 Tenn. 359, 293 S. W. 541 (1927).

⁴⁷ *Iden v. Huber*, 259 Mich. 3, 242 N. W. 818 (1932); *Leifer v. Murphy*, 267 N. Y. Supp. 701, 149 Misc. 455 (Sup. Ct. 1933) (judgment creditor); *Richards v. Jones*, 16 Del. Ch. 227, 142 Atl. 832 (1928). See 1 GLENN, *op. cit. supra* note 28, § 81.

⁴⁸ *Scarborough v. Pickens*, 26 Tenn. App. 213, 170 S. W. 2d 585 (1943); *Oliphant v. Moore*, 155 Tenn. 359, 293 S. W. 541 (1927); *Marcus v. Kane*, 18 F. 2d 722 (C. C. A. 2d 1927); *Dutcher v. Van Duine*, 242 Mich. 477, 219 N. W. 651 (1928). See *Beam v. Bennett*, 51 Mich. 148, 16 N. W. 316 (1883) (judgment creditor); *Hoffman v. Junk*, 51 Wis. 613, 8 N. W. 493 (1881) (judgment creditors).

⁴⁹ *Chorpenning v. Yellow Cab Co.*, 113 N. J. Eq. 389, 167 Atl. 12 (Ch. 1933), *aff'd*, 115 N. J. Eq. 170 (Ct. Err. & App. 1934); *Lange v. Semanske*, 108 N. J. Eq. 538, 155 Atl. 783 (Ch. 1931) (wrongful death). Ohio holds in wrongful death action that the widow is a subsequent creditor. *Edwards v. Monning*, 63 Ohio App. 449, 27 N. E. 2d 156 (1939), *aff'd*, 137 Ohio St. 268, 270, 28 N. E. 2d 627 (1940), "If Ohio were among the states that had adopted the Uniform Fraudulent Conveyance Act, this contention of the defendants would require no discussion, inasmuch as the express provisions thereof authorize a future creditor to set aside a transfer under such circumstances. Furthermore, in the act a creditor is defined as a 'person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent.' However, as indicated by this court in the cases of *Evans v. Lewis*, *supra* [30 Ohio St. 11 (1876)] and *Pfisterer v. Toledo, Bowling Green & Southern Traction Co.*, 89 Ohio St. 172, 106 N. E.

creditor,⁵⁰ or an employee who holds an unliquidated claim for breach of a contract for personal services,⁵¹ or a mortgagee.⁵² But it has been held that a wife seeking alimony has not a creditor's right to attack her husband's purchase of an annuity contract,⁵³ nor is an undertaker a creditor of the person whom he buries, regardless of his relation to the decedent's estate.⁵⁴

In the main, then, the definition of a creditor contained in the Uniform Act restates the liberal meaning of the term, as used in statutes on fraudulent conveyance in Ohio and elsewhere. The important differences under the Act, as will be seen later, lie in the field of enforcement.

Debts

Since the words, "debt" or "debtor", assume a debtor-creditor relation, cases that define a "creditor" are in point also in determining the meaning of a "debt" or "debtor." The terms are equally broad. But while every "debt" is an "obligation," the converse is not necessarily true.⁵⁵

For the purpose of setting aside fraudulent conveyances, it is ordinarily held that a debtor's obligation at the time of transfer may be contingent. Thus a surety's obligation is a "debt" prior to his principal's default,⁵⁶ as is a potential liability for breach of warranty,⁵⁷ of contract to marry,⁵⁸ of an unreleased assignor on a lease

18 [1913], this has not been held the rule in this state. 39 A.L.R., 179." *Edwards v. Monning*, *supra* at 270-271, 28 N. E. 2d 627, 628. In the *Evans* and *Pfisterer* cases tort claimants were required to show intent to defraud subsequent creditors. See 6 OHIO ST. L. J. 319 (1940).

⁵⁰ *McDonald v. Baldwin*, 24 Tenn. App. 670, 148 S. W. 2d 385 (1941). See *Stump v. Rogers*, 1 Ohio 533 (1824); OHIO GEN. CODE § 12206 (1938); 1 GLENN, *op. cit. supra* note 28, § 93d.

⁵¹ *Pallott v. LaSalle Roofing & Shingle Co.*, 254 N. Y. Supp. 748, 142 Misc. 462 (Sup. Ct. 1931).

⁵² *Dondis v. Lash*, 277 Mass. 477, 178 N. E. 624 (1931); *Marshall & Hsley Bank v. Stepke*, *supra* note 44. Cf. *Stephenson v. Donahue*, *supra* note 41.

⁵³ *Maruska v. Equitable Life Ins. Assur. Soc.*, 21 F. Supp. 841 (D. Minn. 1938) (interpreting Minnesota law). Generally it is different as to conveyances of realty. *Renn v. Renn*, 207 Ark. 147, 179 S. W. 2d 657 (1944); *Chittenden v. Chittenden*, 22 Ohio C. C. 498, 12 Ohio C. D. 526 (1901); 1 GLENN, *op. cit. supra* note 28, § 337. Cf. *Rose v. Rose*, *supra* note 38.

⁵⁴ *In re Vitelli's Estate*, 261 N. Y. Supp. 266, 146 Misc. 17 (Surr. Ct. 1932) (to contest a gift causa mortis); *In re Reich's Estate*, 262 N. Y. Supp. 623, 146 Misc. 616 (Surr. Ct. 1933) (to contest a trust).

⁵⁵ *Pennsylvania Co. v. Scott*, 346 Pa. 13, 29 A. 2d 328 (1942).

⁵⁶ *Bussell v. Glenn*, 197 Ga. 816, 30 S. E. 2d 617 (1944); *Barrett & Co. v. Still*, 102 S. C. 19, 86 S. E. 204 (1915); *Ochoa v. Edwards*, 189 S. W. 1022 (Tex. 1916). Cf. *Severs v. Dodson*, 53 N. J. Eq. 633, 34 Atl. 7 (Ct. Err. & App. 1895). See 1 GLENN, *op. cit. supra* note 28, §§ 332, 93d.

⁵⁷ *Cowan v. Staggs*, 178 Ala. 144, 59 So. 153 (1912).

⁵⁸ *Louk v. Patten*, 58 Idaho 334, 73 P. 2d 949 (1937).

for rent,⁵⁹ or the liability of one who assumes a mortgage obligation.⁶⁰ Some courts include the contingent liability of a bank stockholder.⁶¹ Since obligation under a contract arises at date of agreement,⁶² it is not essential to prove that a claim upon contract is enforceable.⁶³ But in any event an indebtedness must be existing or in contemplation.⁶⁴

Ohio General Code Section 11104 uses the words "debtor or debtors," but does not define the terms. The words "debt" or "debtor" do not appear in Section 8618, but the problem of interpretation is the same under either statute. The liberal construction noted above has included persons who are contingently liable upon a note,⁶⁵ or upon a certificate of bank stock,⁶⁶ as well as a surety upon an appeal bond.⁶⁷ But consistently with their stand on tort claimants as creditors our courts class an unliquidated liability for personal injuries as a subsequent as distinguished from a present debt.⁶⁸

The Uniform Act provides that a "Debt" includes any legal liability, whether matured or unmatured, liquidated, absolute, fixed or contingent." The similarity of phrasing in the definition of a "creditor" is apparent, and the liberality of construction follows of course. Hence a continuing surety upon a depository bond is a

⁵⁹ Sallaske v. Fletcher, 73 Wash. 593, 132 Pac. 648 (1913).

⁶⁰ Wallace v. Brooks, 194 Okla. 137, 147 P. 2d. 784 (1944); Nelson v. Wilson, 81 Mont. 560, 264 Pac. 697 (1928).

⁶¹ Peterson v. Wahlquist, 125 Neb. 247, 249 N. W. 678 (1933); Squire v. Cramer, 64 Ohio App. 169, 28 N. E. 2d 516 (1940). Cf. Chamberlin v. Wagar, 272 Mich. 594, 262 N. W. 417 (1935); Irwin v. Schleichert, 327 Ill. App. 512, 64 N. E. 2d 566 (1946); Rogers v. Marchant, 91 F. 2d 660 (C. C. A. 4th 1937); 34 COL. L. REV. 373 (1934); 19 IOWA L. REV. 121 (1933); 1 GLENN, *op. cit. supra* note 28, § 332 n. 79.

⁶² Kennard v. Curran, 239 Ill. 122, 87 N. E. 913 (1909). See Brice v. Myers, 5 Ohio 121 (1831).

⁶³ Arizona State Bank v. Crystal Ice & Cold Storage Co., 26 Ariz. 82, 222 Pac. 407 (1924), *modified on rehearing*, 26 Ariz. 205, 224 Pac. 622 (1924). A creditor's judgment on the debt is conclusive as to the existence of the debt in the absence of collusion of the parties. Candee v. Lord, 2 N. Y. 269 (1849).

⁶⁴ Mills v. Susanka, 394 Ill. 439, 68 N. E. 2d 904 (1946).

⁶⁵ Jones v. Leeds, 7 Ohio N. P. 480, 10 Ohio Dec. (N.P.) 173 (1900).

⁶⁶ Squire v. Cramer, 64 Ohio App. 169, 28 N. E. 2d 516 (1940).

⁶⁷ Kerber v. Ruff, 3 Ohio N. P. 165, 4 Ohio Dec. (N.P.) 406 (1896).

⁶⁸ Kushmeder v. Overton, 26 Ohio App. 74, 159 N. E. 351 (1926); Schuber v. Lilly, 23 Ohio App. 481, 155 N. E. 699 (1926); Friedel v. Wolfe, 41 Ohio App. 564, 180 N. E. 738 (1931); Pfisterer v. Traction Co., 89 Ohio St. 172, 106 N. E. 18 (1913); Evans v. Lewis, 30 Ohio St. 11 (1876). See note 49 *supra*. But he is protected by the attachment statute sections of the code. OHIO GEN. CODE §§ 10290, 11819 (1933). 1 GLENN, *op. cit. supra* note 28, § 81.

debtor,⁶⁹ and the breach of a contract for personal services constitutes a debt,⁷⁰ as does the contingent liability of an indorser.⁷¹ Further, the definition includes an unliquidated *ex delicto* claim⁷² and the liability of a director of a trust company for negligent conduct in approving loans.⁷³ It has also been applied to one who received public financial assistance.⁷⁴

As in the definition of a creditor, any substantial change in the definition of a debt that would follow the adoption of the Act would result in a field of remedies.

INSOLVENCY

The term "insolvency" as applied to fraudulent conveyances is ambiguous. It may mean insufficiency of assets over liabilities,⁷⁵ but this definition⁷⁶ leaves in doubt what assets are to be considered, and the basis as well as the time for their valuation.⁷⁷ Under it one is not necessarily insolvent because his current liquid assets are insufficient to meet his current liabilities,⁷⁸ or to meet them without borrowing money.⁷⁹

In a commercial sense, however, one may be insolvent even

⁶⁹ *State ex rel. v. Nashville Trust Co.*, 28 Tenn. App. 388, 190 S. W. 2d 785 (1944).

⁷⁰ *Pallott v. LaSalle Roofing Co.*, 254 N. Y. Supp. 748, 142 Misc. 462 (Sup. Ct. 1931).

⁷¹ *Shay v. Gagne*, 275 Mass. 386, 176 N. E. 200 (1931).

⁷² *Leifer v. Murphy*, 267 N. Y. Supp. 701, 149 Misc. 455 (Sup. Ct. 1933); *Zuniga v. Evans*, 87 Utah 198, 48 P. 2d 513 (1935).

⁷³ *Comm'r of Banks v. Walker*, 299 Mass. 123, 12 N. E. 2d 103 (1937).

⁷⁴ *Dep't of Public Assistance v. Wanta*, 36 Luz. Leg. Reg. Rep. 61 (Pa. C. P. 1941).

⁷⁵ *Gipson v. Bedard*, 173 Minn. 104, 217 N. W. 139 (1927); *Schroeder v. State*, 210 Wis. 366, 244 N. W. 599 (1932).

⁷⁶ The test of liabilities over assets is used in certain sections of the Bankruptcy Act, §§ 1 (19), 67d (1) (d) (*re* fraudulent conveyances). It was otherwise under the Act of 1867. "Insolvency in the sense of the Bankruptcy Act means that the party whose business affairs are in question is unable to pay his debts as they become due in the ordinary course of his daily transactions." *Buchanan v. Smith*, 16 Wall. 277, 308 (U. S. 1872). "Counsel makes the common mistake of failing to distinguish between the meaning of the term 'insolvent', as the subject of insolvency is dealt with by insolvent and bankruptcy laws, and the general meaning thereof. The former is inability of a person to pay his debts as they mature in the ordinary course of business; the latter is a substantial excess of a person's liabilities over the fair cash value of his property." *Marvin v. Anderson*, 111 Wis. 387, 390, 87 N. W. 226, 227 (1901). See BANKR. ACT §§ 3a (5), 75c, 77a, 83a, 130, 323, 423, 623; 4 COLLIER, BANKRUPTCY § 67.32 (14th ed. 1942).

⁷⁷ 1 MOORE, *op. cit. supra* note 15, at 275.

⁷⁸ *Smith v. Collins*, 94 Ala. 394, 10 So. 334 (1891). See *Wooters v. Osborn*, 77 Ind. 513 (1881).

⁷⁹ See *Silver Valley Min. Co. v. N. C. Smelting Co.*, 119 N. C. 417, 25 S. E. 954 (1896).

though his assets,⁸⁰ if liquid, would satisfy his debts.⁸¹ This would result if his assets were concealed,⁸² or if he could not meet his debts as they ordinarily mature.⁸³ And it would seem that for some purposes an unfavorable balance of liabilities over assets is not controlling, if there is reasonable prospect of payment in due course of business.⁸⁴

These differences in definition are illustrated by two Ohio statutes. Ohio General Code Section 13108-1, relating to stock brokers, adopts the so-called bankruptcy test for insolvency, and provides that "a person shall be deemed insolvent within the meaning of this act whenever the aggregate of his property shall not, at a fair valuation, be sufficient in amount to pay his debts."⁸⁵ On the other hand for purposes of the Sales Act,⁸⁶ "A person is insolvent . . . who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due, whether he has committed an act of bankruptcy, or not, and whether he is insolvent within the meaning of the federal bankruptcy law or not."

The two main Ohio code sections under discussion do not mention insolvency in connection with a fraudulent conveyance. Section 11104, however, refers to transfers made "in contemplation of insolvency and with a design to *prefer* one or more creditors." (Emphasis supplied.) "Contemplation of insolvency" includes either a present or a future condition, and "insolvency" is clearly used in the commercial sense.⁸⁷

⁸⁰ "Land which may be exempted should be included in the estimate, unless there is evidence of an intention on the part of the donor to claim the exemption." *Corliss v. Jewett*, 36 Minn. 364 (1887). *BUMP, op. cit. supra* note 3, at 295. *Cf. Underleak v. Scott*, 117 Minn. 136, 134 N. W. 731 (1912).

⁸¹ *Levan's Appeal*, 112 Pa. 294, 300 (1886); 1 *MOORE, op. cit. supra* note 15, § 8. *Cf. BUMP, op. cit. supra* note 3, §§ 255, 256, 257. "Most of the cases make no attempt to define insolvency and because of this it is impossible to determine to what extent they are in conflict, if at all." *BILLIG AND CAREY, CASES ON ADMINISTRATION OF INSOLVENT ESTATES*, 142 n. (1932).

⁸² *Blake v. Sawin*, 10 Allen 340 (Mass. 1865).

⁸³ *Moore v. Carr*, 65 Mo. App. 64 (1895).

⁸⁴ *Coblentz v. State*, 164 Md. 558, 166 Atl. 45 (1933).

⁸⁵ See *Eastman v. State*, 131 Ohio St. 1, 1 N. E. 2d 140 (1936).

⁸⁶ OHIO GEN. CODE § 8456-3 (1938). See *American Hosiery Co. v. Baker*, 18 Ohio C. C. 604, 10 Ohio C. D. 219 (1899) (rescission for fraud).

⁸⁷ "The law in other respects has been changed, but the phrase, 'in contemplation of insolvency,' has endured; and it means now, as it meant then, that one was in contemplation of insolvency when he realized that either at the time or in the early future his deranged financial condition was or would be such that he would be unable to pay his debts as they became due." *Prose v. Beardsley*, 18 Ohio App. 211, 218 (1924). *Mitchell v. Gazzam*, 12 Ohio 315 (1843); *overruled on another point*, *Cross v. Carstens*, 49 Ohio St. 548, 31 N. E. 506 (1892). "Counsel have labored [to define] the meaning of the term insolvency. In the mercantile sense, it means :

But the solution does not end here. The history of Section 11104 shows that in the law of insolvent estates preferences and fraudulent transfers were originally treated in separate sections. "Contemplation of insolvency" appeared only in the section on preferences. This difference in phrasing was preserved when the two sections were combined.⁸⁸ Because of this background, it is not clear that the commercial definition of insolvency, which is judicially applied to preferences in Section 11104, should be extended to fraudulent conveyances under that section, or to actions under Section 8618.⁸⁹ As to voluntary conveyances under the latter section, it has been said that the property conveyed by a debtor must clearly be sufficient to pay all of his debts.⁹⁰

person unable to pay his debts according to the ordinary usages of trade. But in the broad sense used by the statute, it means a person whose affairs have become so deranged that he is unable to pay his debts as they fall due. . . ." *Mitchell v. Gazzam*, *supra*, at 336. As to "contemplation of insolvency," the court in *Harris v. Pattison Supply Co.*, 17 Ohio L. Abs. 555 (1934), said, "The statute invalidates an assignment made in contemplation of insolvency, with a design to prefer one creditor to the exclusion of another. . . . Such contemplation must be more than a mere apprehension. It must amount to a definitely recognized probability accompanied by provision against such contingency in favor of the creditor preferred." See *Churchill v. Russell*, 18 Ohio C. C. 832, 838, 9 Ohio C. D. 145 (1899).

⁸⁸ History. Preferences: 33 Ohio Laws 13, § 1 (1835); 36 Ohio Laws 56, 57, § 3 (1838); 51 Ohio Laws 163, 463 (1853); REV. STAT. c. 54, § 1, c. 57, § 3, c. 194, § 3, c. 1290, § 1 (Curwen 1853). Preferences and fraudulent conveyances: 56 Ohio Laws 235, §§ 16, 17 (1859); 60 Ohio Laws 8, § 17 (1863); 75 Ohio Laws 938, §§ 9, 10 (1878); REV. STAT. §§ 6343, 6344 (1880); 93 Ohio LAWS 290 (1898); 95 Ohio Laws 608 (1902); 99 Ohio Laws 241 (1908); REV. STAT. c. 2040, §§ 16, 17 (Curwen 1861). *Curruthers v. Kennedy*, 121 Ohio St. 8, 166 N. E. 801 (1929). "A sale, conveyance . . . made in trust or otherwise, by a debtor . . . in contemplation of insolvency and with a design to prefer one or more creditors . . . , and a sale, conveyance . . . made . . . with intent to hinder, delay or defraud creditors, shall be void as to creditors of such debtor. . . ." OHIO GEN. CODE § 11104 (1938).

⁸⁹ Cf. "It will be readily observed that the phrase relating to insolvency in section 11104 long antedates the definition of solvency made by the bankruptcy act, as the term appeared in the legislation of this state at least eighty years ago. The definition of the term in the bankruptcy act, therefore, has no application to the Ohio statute." *Prose v. Beardsley*, *supra* note 87, at 217; See *Jones v. Leeds*, 7 Ohio N. P. 480 (1900) (REV. STAT. §§ 6343, 6344); *Farmer's National Bank of Canfield v. Miller*, 9 Ohio C. C. 111 (1894) (REV. STAT. §§ 6343, 6344). This possible distinction seems not to have been before the court in *Cole v. Merchants' National Bank of Toledo*, 15 Ohio C. C. (N.S.) 315, 341, 342 (1907).

⁹⁰ "And such gift is never upheld, unless property, clearly and beyond doubt, is retained sufficient to pay all the donor's debts." *Crumbaugh v. Kugler*, 2 Ohio St. 373, 378 (1835). "A person claiming under such advancement, must be prepared, however, clearly and conclusively to show that there was other property sufficient to pay all subsisting debts." *Miller v. Wilson*, 15 Ohio 108, 114 (1846); See *Gormley v. Potter*, 29 Ohio St. 597, 599 (1876); *Brice v. Myer*, 5 Ohio 121 (1831).

The Uniform Act provides that "A person is insolvent when the present fair salable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and matured."⁹¹ This is said to be a "commercial definition" of insolvency.⁹² There is authority, however, that "inability to pay current obligations as they mature" does not establish insolvency under this wording.⁹³ The word "present" may not be disregarded,⁹⁴ and property relied upon for proof of solvency must be salable at a fair value.⁹⁵ By definition of assets only non-

⁹¹ The section continues: "(2) In determining whether a partnership is insolvent there shall be added to the partnership property the present fair salable value of the separate assets of each general partner in excess of the amount probably sufficient to meet the claims of his separate creditors, and also the amount of any unpaid subscription to the partnership of each limited partner, provided the present fair salable value of the assets of such limited partner is probably sufficient to pay his debts, including such unpaid subscriptions." Accord, BANKR. ACT 67d(4), 11 U. S. C. 107d(4) (1946). Cf. BANKR. ACT 67d(1) (d) (Bankruptcy test applied to fraudulent conveyances). CRANE, PARTNERSHIP 178 (1938).

⁹² 1 GLENN, *op. cit. supra* note 28, at 465. See Sokol v. Fidelity Union Trust Co., 138 N. J. Eq. 429, 48 A. 2d 207 (Ct. Err. & App. 1946); Fidelity Trust Co. v. Union National Bank of Pittsburgh, 313 Pa. 467, 169 Atl. 209 (1933).

⁹³ Hofan v. Knauth, 282 N. Y. Supp. 219, 156 Misc. 545 (Mun. Ct. 1935). Cf. Chase National Bank v. U. S. Trust Co., 236 App. Div. 500, 260 N. Y. Supp. 40 (1st Dep't 1932).

⁹⁴ Fidelity Trust Co. v. Union National Bank of Pittsburgh, 313 Pa. 467, 169 Atl. 209 (1933); 4 COLLIER, *op. cit. supra* note 10, § 67.32.

⁹⁵ "The Bankruptcy Act provides for determining a person's insolvency by taking his assets 'at a fair valuation'; the ordinary nonstatutory concept commonly styled 'insolvency in the equity sense' involves a valuation of assets at what might be called a 'present quick salable value'. . . . This last test—'present fair salable value'—seems to be intermediate between the other two. Judicial construction of its meaning might be helpful, but little has yet appeared." McLaughlin, *Application of the Uniform Fraudulent Conveyance Act*, 46 HARV. L. REV. 404, 420 (1933). 1 GLENN, *op. cit. supra* note 28, § 272. Excess of liabilities over assets should constitute insolvency under Section 2. Kearney Plumbing Supply Co. v. Gland, 8 N. J. Misc. 789, 151 Atl. 873 (Ch. 1930); People's Savings & Dime Bank & Trust Co. v. Scott, 303 Pa. 294, 154 Atl. 489 (1931). See 1 MOORE, *op. cit. supra* note 15, at 275-283.

Ohio seems to have applied the stricter test of "present quick salable value." "Now, how was it in this case? The property retained by Kugler, liable to the payment of his debts, amounted to about \$48,000. His debts, at the lowest calculation, amounted to \$42,000, and they probably amounted to \$47,000. But taking the amount of indebtedness at the lowest estimate, \$42,000, and experience teaches us that, owing to the expenses incident to the sale, and the sacrifice almost universally attending forced sales, the amount of property reserved would not have paid the debts, if subjected to that purpose." Crumbaugh v. Kugler, 2 Ohio St. 373, 378 (1853). To this extent, adoption of the test of "present fair salable value" would benefit debtors. This advantage, however, might be cancelled out by a shifting to the commercial standard.

exempt property is included,⁹⁶ but no mention is made of property fraudulently transferred.⁹⁷ "Existing debts," of course, include contingent liabilities,⁹⁸ and a return of an execution unsatisfied establishes the debtor's *prima facie* insolvency.⁹⁹ Subsequent insolvency¹⁰⁰ does not govern.

Because of the ambiguities latent in the term "insolvency" and of differences in statutory definition, it would seem advisable—should the Act be adopted—that its definition of insolvency in Section 2 be restricted to purposes of the statute.¹⁰¹ As indicated in the notes,¹⁰² it is problematical whether the total effect of the substitution would materially alter results of the Ohio cases.

⁹⁶ *Wight v. Rohlfss*, 48 Cal. App. 2d 696, 121 P. 2d 76 (1942) (excluding property located outside of the state and immune from local process); *Carter v. Carter*, 55 Cal. App. 2d 13, 130 P. 2d 186 (1942); *Adams v. Prather*, 176 Cal. 33, 167 Pac. 534 (1917). "Whether the property reserved is what will be deemed ample does not depend entirely on the amount and value, as the real end to be accomplished is that the conveyance shall not deprive creditors of the means of collecting their debts." *BUMP, op. cit. supra* note 3, at 298; *BIGELOW, op. cit. supra* note 2, at 225.

⁹⁷ The rule is not clear. "If Scott was solvent when he made the transfer to his wife, aside from the property transferred, it was valid regardless of consideration." *Peoples Savings & Dime Bank & Trust Co. v. Scott*, 303 Pa. 294, 297, 154 Atl. 489, 490 (1931). "In the Uniform Fraudulent Conveyance Act, the term 'assets' is defined as being property liable for debts of the debtor, but this must be held to mean property in his name or property the title which would be in him if a fraudulent conveyance were set aside." *Dorrington v. Jacobs*, 213 Wis. 521, 527, 252 N. W. 307, 309 (1934). "Literally applied the Uniform Act would compel consideration of property fraudulently transferred by A in determining his insolvency. If included it could be argued, however, that it would not substantially affect the determination of A's insolvency, since the 'present fair salable value' of such assets, which *prima facie* belongs to someone else, is about nil." 4 *COLLIER, op. cit. supra* note 10, at § 67.32 n. 9. See *Goodrick v. Sheets*, 19 Ohio App. 207 (1924); *BUMP, op. cit. supra* note 3, § 255.

⁹⁸ UNIFORM FRAUDULENT CONVEYANCE ACT § 1; *Peoples' Savings & Dime Bank & Trust Co. v. Scott, supra* note 97; *Chase National Bank v. U. S. Trust Co.*, *supra* note 93. *But cf. Ayres v. Harrell*, 111 Ga. 864, 36 S. E. 946 (1900) (liability as an indorser not likely to become absolute); *BUMP, op. cit. supra* note 3, § 255.

⁹⁹ *Halsey v. Winant*, 233 App. Div. 103, 251 N. Y. Supp. 81 (1st Dep't 1931), *rev'd on other grounds*, 258 N. Y. 512, 180 N. E. 253 (1932); *Leifer v. Murphy*, 149 Misc. 455, 267 N. Y. Supp. 701 (Sup. Ct. 1933).

¹⁰⁰ *Federal Reserve Bank of Philadelphia v. Godfrey*, 120 N. J. Eq. 203, 184 Atl. 525 (Ct. Err. & App. 1936). See *Creed v. Lancaster Bank*, 1 Ohio St. 1 (1852); *Goodrick v. Sheets, supra* note 97; *National LaFayette Bank v. Scott, Hosea* 481, 13 Ohio Dec. (N.P.) 600 (1903).

¹⁰¹ When it adopted the Act in 1924, the Massachusetts legislature inserted the words "within the meaning of this chapter" after the word "insolvent." MASS. GEN. LAWS c. 109A, § 2 (1932).

¹⁰² See note 5 *supra*.

TRANSFERS FOR VALUE AND IN GOOD FAITH

It is, of course, obvious that the long inveighing by courts and legislatures against fraudulent conveyances is because of debtor transactions¹⁰³ which are considered to be unfair to creditors. This unfairness may result directly from a debtor's intention to defeat claims of his creditors, or indirectly from conditions of a transfer which transgress accepted business standards and so constitute constructive fraud.¹⁰⁴ Such conditions may be associated with the insolvency of the debtor, the inadequacy of price or the disproportionment of security offered, with excessive generosity or preferential treatment, or with indirection in the handling of property. It is a problem, then, of value and of good faith.¹⁰⁵

In the absence of an intent actually to defraud, an insolvent debtor may dispose of his property at its fair market value,¹⁰⁶ or mortgage it to secure future advances.¹⁰⁷ So, also, value to support a transfer may consist of a previous debt¹⁰⁸ unless the parties treat the debt as still existing.¹⁰⁹ A conveyance made in payment of a past gratuity, such as a "voluntary courtesy,"¹¹⁰ or for an executory promise¹¹¹ is not upon a valuable consideration. But not all courts apply this strictness to a debt that is barred by the statute of limitations,¹¹² or to one that is unenforceable under the Statute of

¹⁰³ "Anything out of the usual course of business is a sign of fraud." BUMP, *op. cit. supra* note 3, at 51; 1 MOORE, *op. cit. supra* note 15, at 246, 257.

¹⁰⁴ 1 GLENN, *op. cit. supra* note 28, §§ 296, 305.

¹⁰⁵ "This act . . . shall not extend to any (property that) shall be upon good consideration and *bona fides* conveyed or assured to any person . . . not having at the time . . . any manner of notice or knowledge of such . . . fraud." STAT. 13 ELIZ., c. 5 (1571).

¹⁰⁶ Carlson v. Kirchman, 131 Neb. 229, 267 N. W. 452 (1936).

¹⁰⁷ Reidy v. Collins, 134 Cal. App. 713, 26 P. 2d 712 (1933).

¹⁰⁸ Seymour v. Wilson, 19 N. Y. 417 (1859); BUMP, *op. cit. supra* note 3, § 164 n.; 1 GLENN, *op. cit. supra* note 28, §§ 289, 289a; cf. § 375 n.

¹⁰⁹ Starr v. Starr, 1 Ohio 321 (1824); 1 MOORE, *op. cit. supra* note 15 at 312. It has been held that one who takes such a conveyance is not an innocent purchaser. Taylor v. Taylor, 9 Tenn. App. 70 (1928).

¹¹⁰ *E.g.*, ordinary services within the family. Faloan v. McIntyre, 111 Ill. 292, 8 N. E. 315 (1886); BIGELOW, *op. cit. supra* note 2, at 557 n.

¹¹¹ *E.g.*, check, payment of which is to be withheld. Arnholt v. Hartwig, 73 Mo. 485 (1881). But a negotiable note is sufficient. Weaver v. Nugent, 72 Tex. 272, 10 S. W. 458 (1888); Rogers v. Kinsey, 8 Ohio Dec Rep. 308 (1882). Future services may suffice. *In re Parsons*, 150 Mass. 343 23 N. E. 50 (1890); but there is authority contra. Lehman v. Bentley, 11 N. Y. Supp. 778 (N. Y. City 1892). See BIGELOW, *op. cit. supra* note 2, at 566 n.; 1 MOORE, *op. cit. supra* note 28, at 296-298.

¹¹² May v. Mathers, 233 Ala. 654, 172 So. 907 (1937); Lane v. Newton 145 Ga. 810, 89 S. E. 1083 (1916). *Contra*: Crawford v. Carper, 4 W. Va 56 (1870).

Frauds,¹¹³ or is otherwise founded upon a moral consideration.¹¹⁴ And an assumption of bona fide debts constitutes a valuable consideration.¹¹⁵

The ultimate test of value concerns the depletion of the debtor's estate.¹¹⁶ In order to hold a transfer fraudulent it is not enough that the value received for property is less than its worth in dollars. There is still room in commercial transactions for bargaining at arm's length.¹¹⁷ But there are limits to price inequality, and disparity unexplained may fail to measure up to a "good consideration."¹¹⁸ Marriage suffices to validate a prenuptial agreement to transfer,¹¹⁹ and there are occasions within the family when services rendered or other transactions will uphold a conveyance.¹²⁰ Transfers by an insolvent debtor upon a promise to support, however, are ordinarily vulnerable,¹²¹ and "love and affection" carries no weight¹²²—a fitting commentary from the time of Lord Coke upon

¹¹³ Conveyance upon an oral trust of land. *Ferguson v. Winchester Trust Co.*, 267 Mass. 397, 166 N. E. 709 (1929). Cf. BIGELOW, *op. cit. supra* note 2, at 142-144; BUMP, *op. cit. supra* note 3, § 203.

¹¹⁴ The authorities are not all in agreement. 1 MOORE, *op. cit. supra* note 28, at 295; *De Bardeleben Coal Corp. v. Parker*, 164 Miss. 728, 144 So. 474 (1932); *Schaffer v. Stever*, 153 Wash. 116, 279 Pac. 390 (1929); 1 GLENN, *op. cit. supra* note 28, §§ 214 d, 291 b.

¹¹⁵ The value of the property, the amount of debts, and ability of the grantee to perform are to be considered. *Citizens Bank and Trust Co. v. White*, 12 Tenn. App. 583 (1930); and the corporation "trust fund" theory must be kept in mind. *Darcy v. Brooklyn Ferry Co.*, 196 N. Y. 99, 89 N. E. 461 (1909). See 1 MOORE, *op. cit. supra* note 15, at 305; BUMP, *op. cit. supra* note 3, § 204. But cf. 1 GLENN, *op. cit. supra* note 28, § 282.

¹¹⁶ *Bryce v. National City Bank*, 17 F. Supp. 792 (S. D. N. Y. 1936), *aff'd*, 93 F. 2d 300 (C. C. A. 2d 1937); 1 GLENN, *op. cit. supra* note 28, §§ 199, 274, 275.

¹¹⁷ *Chesher v. Shafter Lake Clay Co.*, 45 N. M. 419, 115 P. 2d 636 (1941); *Toomay v. Graham*, 151 S. W. 2d 119 (Mo. 1941); *Drury v. State Capital Bank of Eastern Shore Trust Co.*, 163 Md. 84, 161 Atl. 176 (1932).

¹¹⁸ *Willamette Grocery Co. v. Skiff*, 118 Ore. 685, 248 Pac. 143 (1926); *Miller v. Smith*, 109 Okla. 203, 235 Pac. 225 (1925); 1 GLENN, *op. cit. supra* note 28, § 296.

¹¹⁹ *Magniac v. Thompson*, 7 Pet. 348 (U. S. 1833); *Smith v. Allen*, 5 Allen 454 (Mass. 1861); BIGELOW, *op. cit. supra* note 2, at 574 n.; 1 GLENN, *op. cit. supra* note 28, § 297; 33 HARV. L. REV. 303 (1919). Cf. BIGELOW, *op. cit. supra* note 2, at 559 (post-nuptial settlements).

¹²⁰ *Third National Bank v. Guenther*, 123 N. Y. 568, 25 N. E. 986 (1888) (salary paid to husband); *People's Bank v. Barrow and Wiggins*, 208 Ala. 433, 94 So. 600 (1922) (release of dower); *Bullard v. Briggs*, 7 Pick. 533 (Mass. 1829) (release of dower). 1 GLENN, *op. cit. supra* note 28, § 298 (b); BUMP, *op. cit. supra* note 3, § 211; BIGELOW, *op. cit. supra* note 2, at 561.

¹²¹ *Johnston's Heirs v. Harvy*, 2 Pen & W. 82 (Pa. 1830). Cf. *Hapgood v. Fisher*, 34 Me. 407 (1852). See 1 GLENN, *op. cit. supra* note 28, § 277.

¹²² *Park v. Battey*, 80 Ga. 353, 5 S. E. 492 (1888); *Slater v. Moore*, 86 Va. 26, 9 S. E. 419 (1889).

the commercial quality of a "good" consideration.¹²³

Absence of consideration in a transfer has always been looked upon askance, and if void or voidable for this reason a gift will ordinarily not be saved because of the grantee's good faith.¹²⁴ Nor is it enough to meet the charge of fraud that consideration is adequate for commercial purposes, if there is a lack of bona fides of which the transferee is aware.¹²⁵ But unless the conduct of the parties is sufficient to convert a preference into a fraudulent conveyance,¹²⁶ a transfer in payment of or security for a past debt is valid at common law, regardless of knowledge by the transferee.¹²⁷ Conduct may, however, disclose the grantor's mala fides, or impugn the grantee's good faith.¹²⁸ Herewith enter badges of fraud,¹²⁹ which

¹²³ "And if consideration of nature of blood should be a good consideration within this proviso, the statute would serve for little or nothing, and no creditor would be sure of his debt." *Twyne's Case*, 3 Coke 80b, 81b (1601).

¹²⁴ Conveyances are voluntary, as to creditors, if supported by no consideration, or according to some authority, by a consideration that is not substantial. *Cairo Lumber Co. v. Ladenberger*, 313 Ill. App. 1, 39 N. E. 2d 596 (1942). Cf. *Appeal of Ferguson*, 117 Pa. 426, 11 Atl. 885 (1888); 14 Am. St. Rep. 739; BIGELOW, *op. cit. supra* note 2, at 532-538; 1 MOORE, *op. cit. supra* note 15, at 336-344, 347-352. For discussion of the English rule *re* voluntary transfers see page 595 *infra*.

¹²⁵ *Jones v. Simpson*, 116 U. S. 609 (1886); *Van Raalte v. Harrington*, 101 Mo. 602 (1890) (knowledge inferred from circumstances). "But those who undertake to impeach for mala fides a deed which has been executed for valuable consideration, have, I think, a task of great difficulty to discharge." *Harman v. Richards*, 10 Har. Ch. 81, 89 (1852). BUMP, *op. cit. supra* note 3, § 182 n. POMEROY, *EQUITY JURISPRUDENCE* §971 (5th ed. 1941).

¹²⁶ *Shelley v. Boothe*, 73 Mo. 74 (1880); BUMP, *op. cit. supra* note 3, § 172; 1 GLENN, *op. cit. supra* note 28, §§ 289 (a), 298 (a).

¹²⁷ *Bamberger v. Schoolfield*, 160 U. S. 149 (1895); BUMP, *op. cit. supra* note 3, §167; 1 MOORE, *op. cit. supra* note 15, at 455; 1 GLENN, *op. cit. supra* note 28, § 289. Cf. BIGELOW, *op. cit. supra* note 2, at 670 n.

¹²⁸ "All experience shows that positive proof of fraudulent acts, between debtor and creditor, is not generally to be expected, and it is for that reason, among others, that the law allows in such controversies a resort to circumstances as the means of ascertaining the truth." *Wager v. Hall*, 16 Wall. 584, 601 (U. S. 1872). "According to general doctrines of the law, one who purchases with notice, i. e., with knowledge of facts which would put a prudent man upon inquiry leading to the truth, and a fortiori one who purchases with knowledge of a fact in itself showing a defect or taint in the title or in the sale, purchases without good faith. This is in accordance with the very language of the statute of 13th Elizabeth; and it is believed to be the better and the more general view of the meaning of the term 'good faith' or 'bona fide' in the statutes generally against fraudulent conveyances. The court of Massachusetts however has always treated the present question as standing upon a footing of its own, and refused to treat a purchaser as brought within the terms of the law by reason merely of notice or even of knowledge on his part of the fraudulent intent of the vendor; creditors will not be authorized to upset the purchase, if that was for value, unless the purchaser actually participated in the fraud. For, if

since Coke's day have expanded the law of fraudulent conveyances under the Statute of 13 Elizabeth and its successors.¹³⁰

Ohio follows the standard doctrine that the presence of a valuable consideration will not absolve a transfer otherwise fraudulent.¹³¹ Inadequacy of price may point to fraud but does not pre-

is said, he may well have known the vendor's purpose without having participated in it." *BIGELOW, op. cit. supra* note 2, at 589. See *Crowder v. Crowder*, 125 Va. 80, 99 S.E. 746 (1919); *BUMP, op. cit. supra* note 3, §§ 181-185. Cf. *Parker v. Conner*, 93 N. Y. 118 (1883). If the grantee participates, creditors may reach all the property transferred even though full value is paid. *Baldwin v. Short*, 125 N. Y. 553, 26 N. E. 928 (1891); or the grantee may be held personally liable for the value of the property. *Koellhoffer v. Peterson*, 82 Misc. 180, 143 N.Y. Supp. 353 (1913); 27 HARV. L. REV. 181 (1913); even though stolen while in the grantee's possession. *Hargreaves v. Tennis*, 63 Neb. 356, 88 N.W. 486 (1901). After conveyance or restoration of the property, he is not liable to creditors as a trustee. *Swift and Nicholas v. Holdridge*, 10 Ohio 230 (1840); *White v. Brocaw*, 14 Ohio St. 339 (1863); *Funkhouser v. Lay*, 78 Mo. 458 (1883); 1 *GLENN, op. cit. supra* note 28, § 57. See 2 *MOORE, op. cit. supra* note 15, at 592, 615, 685n. Cf. *Clark v. Beecher*, 154 U. S. 631 (1878).

¹²⁹ "Badges or signs of fraud, are inferences drawn by experience, from the customary conduct of mankind, which is in general marked by selfishness, and distrust of his fellows." *Terrell v. Green*, 11 Ala. 207, 213 (1847). "The reason why any act is denominated a badge of fraud is either because its natural and probable tendency is to delay, hinder, or defraud creditors, or because it is not in the usual course in which men acting in good faith transact business. The first ground rests upon the principle that every man is presumed to intend the natural and probable consequence of his act; the second ground is the result of experience. Whatever is out of the usual course betrays contrivance to give color to the transaction." *BUMP, op. cit. supra* note 3, at 31. 1 *GLENN, op. cit. supra* note 28, § 307(a).

¹³⁰ E.g., retention of possession by vendor of chattel. *Twyne's case*, 3 Coke 80b (1601); *BIGELOW, op. cit. supra* note 2, c. XVII; 1 *MOORE, op. cit. supra* note 15, at 247; 1 *GLENN, op. cit. supra* note 28, § 341n.; upon secret trust in favor of the grantor. *Pacific National Bank v. Windram*, 133 Mass. 175 (1882); *BUMP, op. cit. supra* note 3, §§ 191, 192, 194; false recitals in deeds, *Bailey v. Cheatham*, 4 Ky. L. REV. 351 (1882); 2 *MOORE, op. cit. supra* note 15, at 605; illegal provisions contained in a deed of general assignment. *Tribune Co. v. Canger Floral Co.*, 312 Ill. App. 149, 37 N.E. 2d 906 (1941); *BIGELOW, op. cit. supra* note 2, at 307n.; *BUMP, op. cit. supra* note 3, § 340; sales in bulk. *Hutchinson v. Walton*, 119 W. Va. 709, 196 S.E. 20 (1938); failure to record instrument. *Clafin & Co. v. Freudenthal*, 58 N.J. Eq. 298, 43 Atl. 529 (Ch. 1899); 1 *MOORE, op. cit. supra* note 15, at 251; conveyances in anticipation of or pending suit. *Yellow Mfg. Acceptance Corp. v. American Taxicabs*, 344 Mo. 1200, 130 S.W. 2d 601 (1939). Cf. *First National Bank of Parsons v. Cottangim*, 145 Kan. 330, 65 P. 2d 293, 294 (1937); conveyances not in the usual course of business. *Maxwell v. Adams*, 130 Me. 230, 154 Atl. 904 (1931); sales upon extended credit. *Borland v. Walker*, 7 Ala. 269 (1854); 1 *MOORE, op. cit. supra* note 15, at 256; *Re Kinship* see *Russell v. Franks*, 343 Mo. 159, 120 S.W. 2d 37 (1938); 1 *MOORE, op. cit. supra* note 15, at 248.

¹³¹ *Hamill v. Wright*, 5 Ohio N.P. 9, 8 Ohio Dec. (N.P.) 467 (1897); *Underwood v. Lapp*, 29 Ohio L. Abs. 582, 586 (1939).

vent a "bargain."¹³² Preferences within an assignment for creditors¹³³ only became invalid through legislation.¹³⁴ If made separately from an assignment they are still protected when the transferee has no knowledge of the design to prefer,¹³⁵ and a literal construction of Sections 11104 and 11105 of the Ohio General Code would exclude from their provisions preferential payments of money,¹³⁶ as distinguished from other types of preferential transfers now expressly included.¹³⁷ Preferences by insolvent corporations that have suspended business come under the interdiction of the "trust fund" theory.¹³⁸

Good faith of the parties is essential under either Section 8618¹³⁹ or 11105,¹⁴⁰ and when present in the grantee will save a

¹³² *Rooker v. Rooker*, 29 Ohio St. 1 (1875); *Citizens National Bank v. Wehrle*, 18 Ohio C. C. 534, 544, 9 Ohio C. D. 330 (1897), *aff'd* 61 Ohio St. 654, 57 N.E. 1131 (1899); *Hamill v. Wright*, 5 Ohio N.P. 9, 12, 8 Ohio Dec. (N.P.) 467 (1897).

¹³³ Imposing no terms and exacting no delays. *Stevenson v. Agry*, 7 Ohio 247 (1836); *Hull v. Jeffrey*, 8 Ohio 390 (1838). Cf. *Atkinson and Rollins v. Jordan, Ellis & Co.*, 5 Ohio 293 (1832) (exacting release); *Replier v. Orrich*, 7 Ohio 246 (1836) (postponement for one year and distribution among such creditors who would agree to take a pro rata share); *Suydam and Jackson v. Martin*, *Wright* 698 (Ohio 1834) (in trust partly for benefit of assignor).

¹³⁴ For history see *National Bank of Commerce v. Gettinger*, 68 Ohio St. 389, 392-394, 67 N.E. 739 (1903). OHIO GEN. CODE §§ 11104, 11105 (1938). See *Robertson v. Desmond & Ryan*, 62 Ohio St. 487, 57 N.E. 235 (1900).

¹³⁵ *Carruthers v. Kennedy*, 121 Ohio St. 8, 166 N.E. 801 (1929). See *Irwin v. Maple*, 252 Fed. 10 (C.C.A. 6th 1918).

¹³⁶ *Bank v. Gettinger*, *supra* note 134, at 400; *Erie R.R. v. Fulton*, 19 Ohio L. Abs. 70 (1935); *Pabst Brewing Co. v. Johnson*, 17 Ohio C.C. (N.S.) 1, 41 Ohio C.C. 675 (1908), *aff'd*, 81 Ohio St. 566, 91 N.E. 1136 (1910). A sale not in trust was not within the terms of earlier statutes. *Atkinson v. Tomlison*, 1 Ohio St. 237 (1853); *Bagaley & Co. v. Waters*, 7 Ohio St. 360 (1857).

¹³⁷ "The case of *National Bank of Commerce v. Gettinger* . . . involved the right of a creditor to receive payment from his debtor while such debtor is insolvent, and it was held that Section 6343 was not intended to prevent payments of the just amounts due to lawful creditors. It is true that, at the time of the decision of this court in 1903, the proviso above referred to had not been added to the statutes." *Carruthers v. Kennedy*, *supra* note 135, at 15. See also Bankruptcy Act § 60(b), 11 U. S. C. § 96(b).

¹³⁸ *Rouse v. Merchants' National Bank of Cincinnati*, 46 Ohio St. 493 (1889); *City Auto Stamping Co. v. State ex rel. Fulton*, 13 Ohio L. Abs. 67 (1932). Cf. *Erie R. R. v. Fulton*, 19 Ohio L. Abs. 70 (1935).

¹³⁹ *Blackford v. Gaynor*, 50 Ohio App. 494, 497, 198 N.E. 736 (1934); *Astor v. Wells*, 4 Wheat. 466 (U.S. 1819). See *Burgett v. Burgett*, 1 Ohio 469 (1824); *Brown v. Cutler*, 8 Ohio 142 (1837).

¹⁴⁰ *Bobilya v. Priddy*, 68 Ohio St. 373, 67 N.E. 736 (1903); *Detroit, T. & I. Ry. v. Wright*, 48 Ohio App. 305 (1933).

¹⁴¹ *Lytle v. Baldinger*, 84 Ohio St. 1, 95 N.E. 389 (1911) (Rev. Stat. § 6343); *Harbine v. Harper*, 21 Ohio L. Abs. 226 (1936) (Gen. Code § 11105).

transfer for value which is otherwise fraudulent.¹⁴¹ Since the fraudulent character of a transfer may depend upon circumstances,¹⁴² badges of fraud may be resorted to in order to determine the intent of the grantor¹⁴³ or want of bona fides in the grantee.¹⁴⁴ Within the family a transfer though subject to scrutiny is saved if the consideration is valuable;¹⁴⁵ but "love and affection" are not so classed,¹⁴⁶ nor is an agreement for future support.¹⁴⁷ Because the proviso in Section 11105 which saves fraudulent transfers for lack of the grantee's knowledge does not apply to Section 8618, a gift by an insolvent debtor is constructively fraudulent under that section, regardless of the donee's state of mind.¹⁴⁸

¹⁴² "In order that an act be constructively fraudulent it is essential that it would, either in the particular case or in common experience, lead to consequences equivalent to those following actual fraud." *Stevens v. Summers*, 68 Ohio St. 421, 441, 67 N.E. 884 (1903) (Rev. Stat. § 6344). *Bank v. Trebein*, 59 Ohio St. 316, 52 N.E. 834 (1898) (Rev. Stat. § 6344); *Jamison v. McNally*, 21 Ohio St. 295, 304 (1871) (Section 17, Act 1859 as amended); *Jones v. Leeds*, 7 Ohio N. P. 480, 10 Ohio Dec. (N.P.) 173 (1900) (Rev. Stat. § 6344); *Berry v. Haas*, 12 Ohio C. C. 189 (1895) (creditor's bill); *Cole v. Merchants National Bank of Toledo*, 15 Ohio C. C. (N. S.) 315 (1907) (Rev. Stat. § 6344). An intention to pay ultimately is no defense. *Trimble v. Doty*, 16 Ohio St. 118 (1865).

¹⁴³ *Barr v. Hatch*, 3 Ohio 527 (1828) (conveyance pending suit); *Hoffman, Burneston & Co. v. Mackall*, 5 Ohio St. 124, 134 (1855) (provisions in a general assignment); *Brinkerhoff v. Tracy*, 55 Ohio St. 558, 45 N.E. 1100 (1897) (provisions in special assignment); *Friedel v. Wolfe*, 41 Ohio App. 564 (1931) (gratuitous transfer pending suit); *Pride v. Andrew*, 51 Ohio St. 405 (1894) (conveyance pending suit); *Ferguson v. Gilbert*, 16 Ohio St. 88 (1865) (conveyance upon a secret trust). OHIO GEN. CODE § 8617 (1938) (conveyance upon trust for grantor); OHIO GEN. CODE § 8619 (1938) (loans of goods); OHIO GEN. CODE § 8405 (1938) (retaining possession by seller); *O'Connell v. Cruise*, 1 Handy 164, 12 Ohio Dec. Rep. 81 (Cin. Sup. Ct. 1854) (sale of merchandise to clerk on credit).

¹⁴⁴ *Loudenback v. Foster*, 39 Ohio St. 203 (1883) (conditions of sale); *Burbridge v. Seely, Morley & Co., Wright* 359 (Ohio 1833) (retention of possession). See *Stewart v. Hopkins*, 30 Ohio St. 502, 529 (1876) (*re* delay in recording a mortgage).

¹⁴⁵ *Gould v. Cooper*, 15 Ohio App. 223 (1919); *Van Ingen v. Peterson*, 12 Ohio C.C. (N.S.) 253, 21 Ohio C. Dec. 506 (1909), *aff'd*, 84 Ohio St. 473, 95 N.E. 1153 (1911); *Grote v. Meyer*, 6 Ohio D. Rep. 1025 (1881) (release of dower); *Singree v. Welch*, 32 Ohio St. 320 (1877) (release of dower); *Whistler v. Allward*, 57 Ohio App. 147, 12 N.E. 2d 299 (1936) (marriage); *Whitacre v. Redmond*, 8 Ohio L. Rep. 165 (1910) (wife refraining from suing for divorce). Cf. *Huwe v. Knecht*, 10 Ohio App. 487 (1919).

¹⁴⁶ *Burrage v. Beardsley*, 16 Ohio 438 (1847); *State ex rel. Fulton v. Loar*, 21 Ohio L. Abs. 156 (1934); *Holmes v. Sullivan*, 9 Ohio Dec. Rep. 499. (1885).

¹⁴⁷ *Akron Building & Loan Ass'n v. Foltz*, 16 Ohio C. C. (N.S.) 299, 36 Ohio C. D. 572 (1908); *Krider v. Koons*, 5 Ohio C. C. 221, 3 Ohio C. D. 110 (1891).

¹⁴⁸ *Huwe v. Knecht*, 10 Ohio App. 487 (1919); *State ex rel. Fulton v. Loar*, 21 Ohio L. Abs. 156 (1934); *Allen v. Toth*, 22 Ohio L. Abs. 457 (1935);

The Uniform Act provides in Section 3 that:

Fair consideration is given for property, or obligation, (a) When in exchange for such property, or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied, or (b) When such property, or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property, or obligation obtained.

This definition codifies existing law. Although it provides that a "fair equivalent" shall be given in exchange, or that security must not be "disproportionately small," these requirements are probably but two aspects of the old rule that the reasonableness of consideration shall depend upon the facts of the individual case.¹⁴⁹

The definition expressly preserves the common-law rule that satisfaction of a preexisting debt supplies value.¹⁵⁰ This may be so even within the family.¹⁵¹ Likewise a moral consideration may serve,¹⁵² and marriage is a thing of value.¹⁵³ "Natural affection,"

Ortman v. Falknor, 27 Ohio L. Abs. 312 (1938) Bank v. Weaver, 68 Ohio App. 323, 40 N.E. 2d 953 (1941). *Re* nominal consideration. Vilas v. Christopher, 33 Ohio L. Rep. 589 (1930). But it may be valid as to subsequent creditors. Bank v. Ennes, Wright 604 (1834).

¹⁴⁹ "What is fair consideration must, of course, be determined upon the facts and circumstances of each particular case." Halsey v. Winant, 258 N. Y. 512, 523, 180 N.E. 253 (1932). See *In re Rasmussen's Estate*, 238 Wis. 334, 298 N.W. 172 (1941); Bianco v. Lay, 313 Mass. 444, 48 N.E. 2d 36 (1943); Utah Assets Corp. v. Dooley Bros. Ass'n, 92 Utah 577, 70 P. 2d 738 (1937); 1 GLENN, *op. cit. supra* note 28, §296. 42 MICH. L. REV. 706-708 (1944); [1938] WIS. L. REV. 341-349. Bridgman, *Uniform Fraudulent Conveyance Act in Minnesota*, 7 MINN. L. REV. 453, 464 (1923).

¹⁵⁰ Hirsh v. Levinson Bros., 117 N.J. Eq. 131, 174 Atl. 736 (Ct. Err. & App. 1934); Williams v. Peterson, 86 Utah 526, 46 P. 2d 674 (1933); *In re Handerson*, 3 Fed. Supp. 92 (1933); Mason v. Mason, 296 Mich. 622, 296 N.W. 703 (1941); *In re Gutenkunst's Estate*, 232 Wis. 81, 286 N.W. 566 (1939). Also see: Pauly v. Shultz, 199 Wis. 107, 225 N.W. 745 (1929), 46 HARV L. REV. 404, 450 (1932); [1939] WIS. L. REV. 360, 371. A waiver of the bar of the statute of limitations has been upheld: Central Hanover B. & T. Co. v. United Traction Co., 95 F. 2d 50 (1938); 1 GLENN, *op. cit. supra* note 28, § 214d.

¹⁵¹ Baer v. Hespel, 258 Mich. 427, 242 N.W. 780 (1932); Klaseus v. Meester, 173 Minn. 468, 217 N.W. 593 (1928); Bocalero v. Bee, 102 Utah 12, 126 P. 2d 1063 (1943); Share v. Trickle, 183 Wis. 1, 197 N.W. 329 (1924) (release of dower). Cf. Folson v. Seapy, 10 F. 2d 322 (1926). If a conveyance to a wife is upset because of fraud, her dower rights are said to revive. Beat v. Michelson, 221 Wis. 176, 226 N.W. 244 (1936).

¹⁵² Ferguson v. Wincester Trust Co., 267 Mass. 397, 166 N.E. 709 (1929) (statute of frauds); Central Hanover Bank & Trust Co. v. United Traction Co., 95 F. 2d 50 (1938) (statute of limitations); Banking Com. v. Buchanan, 227 Wis. 544, 279 N.W. 71 (1938) (statute of limitations).

¹⁵³ Bracklein v. McNamara, 147 Md. 17, 127 Atl. 497 (1925); American Surety Co. v. Conner, 251 N.Y. 1, 166 N.E. 783 (1929).

however, has no more standing than before,¹⁵⁴ and the same holds true for prior services voluntarily rendered,¹⁵⁵ or for promises of future support.¹⁵⁶ Nor is an executory consideration a "fair equivalent."¹⁵⁷ Or course, a voluntary transfer is not supported by a fair consideration,¹⁵⁸ nor is one where the value is nominal.¹⁵⁹

But in addition to value received or given, a transaction to be sustained under the Act must be performed in "good faith"—a qualification which saves the test from the starkness of sheer money value.¹⁶⁰ It also raises afresh the position of badges of fraud. This is especially so in view of the Commissioner's statement that "In the Act as drafted all possibility of presumption of law as to intent is avoided."¹⁶¹ Yet insofar as "good faith" is descriptive of a debtor's state of mind or of a grantee's knowledge, it would seem that conditions which accompany a transfer retain such weight as evidence, either for or against good faith, as past experience justifies.¹⁶²

¹⁵⁴ *Cooper v. Cooper*, 22 Tenn. App. 473, 124 S.W. 2d 264 (1939).

¹⁵⁵ *Pittsburg Bank v. Purcell*, 286 Pa. 114, 133 Atl. 31 (1926); *Kessler v. Sooy*, 110 N.J. Eq. 559, 160 Atl. 574 (Ct. Err. & App. 1932), *affirming* 108 N.J. Eq. 86, 154 Atl. 108 (Ch. 1931); *Kowal v. Sudol*, 132 N.J. Eq. 61, 26 A. 2d 795 (Ch. 1942).

¹⁵⁶ *Petition of National Bank of N.Y.*, 269 App. Div. 1040, 58 N.Y.S. 2d 620 (2d Dep't 1945); 5 U. or PA. L. REV. 161 (1856).

¹⁵⁷ *Angers v. Sabatinelli*, 235 Wis. 422, 293 N.W. 173 (1941). An enforceable promise has been held to be sufficient: *Schlecht v. Schlecht*, 168 Minn. 168, 209 N.W. 883 (1926); *Hollander v. Gautier*, 114 N.J. Eq. 485, 168 Atl. 860 (Ch. 1933). Cf. *McLaughlin, Application of the Uniform Fraudulent Conveyance Act* 46 HARV. L. REV. 404 447 (1933). Note, *Executory Consideration as "Fair Consideration" under the Uniform Fraudulent Conveyance Act*, 39 MICH. L. REV. 654 (1941).

¹⁵⁸ Commissioners' Prefatory Note: "Certain conveyances, such as a gift by the insolvent, are declared fraudulent irrespective of intent." See *Bennett v. Rodman & English, Inc.*, 2 F. Supp. 355 (1932), *aff'd*, 62 F. 2d 1064 (1932).

¹⁵⁹ *Emmi v. Patane*, 128 Misc. 901, 220 N.Y.Supp. 495 (Sup. Ct. 1927); *Zuniga v. Evans*, 87 Utah 198, 48 P. 2d 513 (1935).

¹⁶⁰ Commissioners' note, 44 A.B.A. REP. 343 (1919): "The cases relating to the subject of this section (3) usually deal with the amount of the consideration as indicating whether there is a fraudulent intent on the part of the grantor or collusion on the part of the grantee. It is submitted that the real question in such cases is, the good faith of the grantee, and whether the consideration given by him is a reasonable equivalent for the property received." Hence a preference received in bad faith is voidable: *Geller v. Johnsen*, 95 N.J. Eq. 516, 123 Atl. 725 (Ch. 1924).

¹⁶¹ Prefatory Note, 9 UNIFORM LAWS ANN. 326 (1938).

¹⁶² Constructive fraud is inferentially recognized in Section 9(2) as to "a purchaser who without actual fraudulent intent has given less than a fair consideration." (Emphasis supplied.) And the Commissioners' note to Section 44 A.B.A. Rep. 343 (1919), insofar as it affects voluntary transfers, reads: "In dealing with the subject of the section our courts have usually treated a voluntary conveyance by an insolvent as indicating an irrebuttable presumption of fraudulent intent." As stated in the Prefatory Note,

While the Act is mainly silent in this regard, Section 11 specifically declares that "in any case not provided for . . . the rules of law and equity . . . shall govern." This reservation seems to support the conclusion that Lord Coke's admonition in *Twyne's* case that merchants should guard the openness of their dealings,¹⁶³ is preserved under this most modern successor to the Statute of 13 Elizabeth.¹⁶⁴ So, the suspicion created by retention of property by a debtor-transferor¹⁶⁵ or the reservation of a secret trust¹⁶⁶ should still have its relevancy, whether it bears specifically upon the good faith of the debtor or of the transferee. Presumptions, rejected upon the legal level, return as inferences from circumstances taught by business experience.¹⁶⁷

Although the definition of a "fair consideration" contained in Section 3 of the Act is seemingly directed toward transfers by debtors, its terms are broad enough to include subgrantees and attaching

this awkward method of treating the subject arose from the wording of the 13th of Elizabeth. That statute renders void those conveyances only which are made with the 'intent' to 'hinder, delay, and defraud' creditors. To avoid a gift made by an insolvent where no actual intent to defraud existed, it was necessary to 'presume as a matter of law' an intent to defraud." The matter is now handled by definition in section 4.

¹⁶³ *Attorney General v. Twyne*, 3 Co. ¶ 806, ¶ 81a (1601). "So a good consideration doth not suffice, if it be not also bona fide: and therefore, reader, when any gift shall be to you in satisfaction of a debt, by one who is indebted to others also; 1st, Let it be made in a public manner, and before the neighbours, and not in private, for secrecy is a mark of fraud. 2nd Let the goods and chattels be appraised by good people to the very value, and take a gift in particular in satisfaction of your debt. 3rd, Immediately after the gift, take possession of them; for continuance of the possession in the donor, is a sign of trust."

¹⁶⁴ *General Kontrolar Co. Inc. v. Allen*, 124 F. 2d 123, 126 (1942), quoting report of House Committee on the Judiciary *in re* adoption of the Section 7 of the Uniform Act in 123, 126 (1942), Section 67d (11 USC 107d 1940) of the Bankruptcy Act: "this was done because the Uniform Act is largely declaratory of the better decisions of American State courts construing the statute of Elizabeth . . . It has been adopted in a number of States, and may in time be adopted in most of the States."

¹⁶⁵ *Takacs v. Kapela*, 264 App. Div. 871 (2d Dept. 1942). 35 N.Y.S. 2d 502. *McLaughlin, Application of the Uniform Fraudulent Conveyance Act*, 46 HARV. L. REV. 404, 406: "at any rate, it seems to be assumed without exception that conveyances may stand or fall according to the local law of fraudulent retention of possession without reference to the Fraudulent Conveyance Act." See note 245 *supra*.

¹⁶⁶ *McCreary's Estate v. Pitts*, 354 Pa. 347, 47 A. 2d 235 (1946); *State ex rel. v. Nashville Trust Co.*, 190 S.W. 2d 785 (Tenn. 1945).

¹⁶⁷ For analogous treatment: section 36-406, Revised Statutes of Nebraska (1943), provides that "the question of fraudulent intent" in fraudulent transfers "shall be deemed a question of fact, and not of law." See: *Bokhoof v. Stewart*, 89 N.W. 759, 760 (Neb. 1902); *Farmers' & Merchants' Nat. Bank v. Mosher*, 63 Neb. 130, 88 N.W. 552 (1901); *Bank of Commerce v. Schlotfeldt*, 40 Neb. 212, 58 N.W. 727 (1894).

creditors of grantees. So construed the section extends to these persons the protection formerly accorded them,¹⁶⁸ without reference to the saving provisions in Section 11.¹⁶⁹

CONVEYANCES BY AN INSOLVENT

Absence of a "fair consideration" for a transfer by a debtor has given rise to two rules regarding voluntary transfers of property. According to the earlier English rule, a gift by an indebted person is fraudulent regardless of his solvency or good faith.¹⁷⁰ The fact of indebtedness at the time of gift raises a conclusive presumption of fraud.¹⁷¹ As long as existing debts remain outstanding the transfer may be attacked, even by creditors whose claims arose subsequently to the gift.¹⁷² A strict interpretation of the term "creditors," however, excludes the holder of a contingent claim.¹⁷³

¹⁶⁸ *In re Mullen*, 101 Fed. 413 (1900); *Holmes v. Gardner*, 50 Ohio St. 167, 33 N.E. 644 (1893); *Swift and Nichols v. Holdridge*, 10 Ohio 231 (1840). But the authorities are not all in accord. See Notes, 32 L.R.A. 69 (1911); 57 L.R.A. 891 (1915); 63 A.L.R. 1367 (1929); 5 B.R.C. 277 (1916). Section 67d (6) of the Bankruptcy Act expressly protects the bona fide lienor of the grantee. See also Bankruptcy Act Section 70e (1). For protection afforded subgrantees prior to the Uniform Act see *Anderson v. Roberts*, 18 Johns. 515 (N.Y. 1820); *Green v. Robins*, 29 N.D. 131, 150 N.W. 561 (1914), 63 U. of Pa. L. Rev. 574 (1915); 1 GLENN, *op. cit. supra* note 28, § 236 n.; 2 MOORE, *op. cit. supra* note 15, at 725-727.

¹⁶⁹ This construction is also implicit in the provisions of Sections 9 and 10 of the Act. The protection afforded in Section 9 to a "purchaser for fair consideration without notice of the fraud" has been held to include an attaching creditor of the grantee. See note 282 *infra*. 1 GLENN, *op. cit. supra* note 28, § 238.

¹⁷⁰ *Townshend v. Windham*, 2 Ves. Sr. 1, 10 (Ch. 1750); *Reade v. Livingston*, 3 Johns. Ch. 481 (N.Y. 1818). This doctrine has been overruled both in England and in some states either by later cases or by statute. *Freeman v. Pope*, L.R. 5 Ch. App. 538, 541 (1870); *Seward v. Jackson*, 8 Cow. 406 (N.Y. 1826); N.Y. REAL PROP. LAW §265; N. Y. PERS. PROP. LAW § 36; *Conway v. Raphael*, 102 N.J. Eq. 531, 532, 141 Atl. 804 (Ct. Err. & App. 1928); *Lloyd v. Fulton*, 91 U.S. 479 (1875). But it is still the rule in some states. VA. CODE ANN. § 5185 (1942); W. VA. CODE ANN. § 3987 (1943); 25 VA. L. REV. 862 (1939).

¹⁷¹ The existing debts must have been substantial. Current expenses or debts inconsiderable in relation to the grantor's estate are not sufficient. *Buchanan v. McNinch*, 3 S.C. 498 (1872).

¹⁷² *Reade v. Livingston*, 2 Ves. Sr. 1 (Ch. 1750).

¹⁷³ A holder of a note is not considered to be a creditor of his accommodation indorser. *Severs v. Dodson*, 53 N.J. Eq. 633, 34 Atl. 7 (Ct. Err. & App. 1895). The rule is changed under the Uniform Fraudulent Conveyance Act. *Conway v. Raphael*, 102 N.J. Eq. 531, 141 Atl. 804 (Ct. Err. & App. 1928); 1 GLENN, *op. cit. supra* note 28, § 332, HANNA AND McLAUGHLIN, CASES ON CREDITOR'S RIGHTS 96 n. 2 (3d ed. 1939); 1 GLENN, CASES ON CREDITORS' RIGHTS 126 n. 28 (1940). It has also been modified by decisions. See *Bibb v. Freeman*, 59 Ala. 612 (1877) where a covenantee of general warranty was considered a creditor from date of the covenant. Cf. *Bridgeford v. Riddell*,

On the other hand by the majority rule, indebtedness at the time of gift raises merely an inference of fraudulent intent which may be rebutted by proof of the debtor's solvency.¹⁷⁴ In some states if insolvency is shown, subsequent creditors may attack the transfer while existing debts remain unpaid.¹⁷⁵ The intention to defraud existing creditors is extended to subsequent ones.¹⁷⁶ In other states subsequent creditors may attack only if there is an actual intention to defraud them.¹⁷⁷

Ohio follows the majority rule that a voluntary conveyance may not be set aside upon the mere showing of grantor's indebtedness. The need to retain assets clearly sufficient in amount to pay debts has been noted.¹⁷⁸ In the absence of an actual intention to defraud their class, subsequent creditors¹⁷⁹ may not complain.¹⁸⁰ The good faith of the parties will not save a gift by an insolvent.¹⁸¹ It is dif-

55 Ill. 261 (1870). Also see: *Peterson v. Wahlquist*, 125 Nev. 247, 249 N.W. 678 (1993); 34 Col. L. Rev. 373 (1934); *Ganun v. Palmer*, 216 N.Y. 603, 111 N.E. 223 (1916).

¹⁷⁴ *Lloyd v. Fulton*, 91 U.S. 479 (1875); *Salmon v. Bennett*, 1 Conn. 525 (1816); *Adams v. Deem*, 296 Ill. App. 571, 16 N.E. 2d 817 (1938); *Goodman v. Wineland*, 61 Md. 449 (1883); *Cole v. Tyler*, 65 N.Y. 73 (1875). The nominal value equal to or greater than the amount of the debt is immaterial if subsequent events show that the property retained was insufficient to discharge all the liabilities. *Cairo Lumber Co. v. Landenberger*, 313 Ill. App. 1, 39 N.E. 2d 596 (1941). And see *BUMP*, *op. cit. supra* note 3, §§ 259, 260.

¹⁷⁵ *GLENN*, *op. cit. supra* note 28, at 322; *BUMP*, *op. cit. supra* note 3, at 296; *MAY*, *op. cit. supra* note 4, at 519; 1 *MOORE*, *op. cit. supra* note 15, at 194. See *Moore v. Bay*, 284 U.S. 4 (1931).

¹⁷⁶ 1 *GLENN*, *op. cit. supra* note 28, at 324; 1 *MOORE*, *op. cit. supra* note 15, at 186, 194.

¹⁷⁷ *Harlan v. Maglaughlin*, 90 Pa. 293 (1879); 1 *MOORE*, *op. cit. supra* note 15, at 186, 194. Concerning indebtedness on a running account see Note, ANN. CAS. 1913C 1376. Cf. 1 *MOORE*, *id.* at 183.

¹⁷⁸ See note 90 *supra*.

¹⁷⁹ *Evans v. Lewis*, 30 Ohio St. 11 (1876); *Crumbaugh v. Kruger*, 2 Ohio St. 373, 379 (1853); *Creed v. Lancaster Bank*, 1 Ohio St. 1 (1852); *Walston v. McCabe*, 11 Ohio N.P. (N.S.) 26, 31 (1911); *Hedrick v. Gregg*, 8 Ohio N.P. 24, 10 Ohio Dec. (N.P.) 462 (1901); *Robinson v. Von Dolcke*, 1 Ohio N.P. 429, 3 Ohio Dec. (N.P.) 107 (1894). A secret trust constitutes a continuing fraud. *Webb's Adm'r v. Roff*, 9 Ohio St. 430, 435 (1859); *Bowlus v. Shanabarger*, 19 Ohio C. C. 137, 10 Ohio C. D. 167 (1899). But subsequent creditors probably share in a distribution under Section 11104. See *Lally v. Farr*, 6 Ohio N.P. 73, 9 Ohio Dec. (N.P.) 119 (1899); *Re Kohler*, 159 Fed. 871 (1908). Cf. *Burt v. Keyes*, 4 Fed. Cas. 858 No. 2212 (C.C.N.D. Ohio 1861). See note 222 *infra*.

¹⁸⁰ In an action by an administrator against his intestate's murderer, who conveyed property prior to suit, the defendant was classed as a subsequent creditor. *Sechrist v. Veres*, 9 Ohio Op. 492, 2 Ohio Supp. 126 (C.P. 1937).

¹⁸¹ See note 148 *supra*. See also *Squire v. Cramer*, 64 Ohio App. 169, 28 N.E. 2d 516 (1940); *Ursak v. Spivanick*, 56 Ohio App. 434, 10 N.E. 2d 1017 (1937).

ferent, of course, if there is consideration.¹⁸²

Section 4 of the Uniform Act condemns gifts by insolvents, providing that "Every conveyance made and every obligation incurred by a person who is or will thereby be rendered insolvent is fraudulent as to creditors without regard to his intent if the conveyance is made or the obligation incurred without a fair consideration."

Through the requirement of insolvency this definition adopts the majority rule as to gifts by solvent debtors. The use of the term "creditors," rather than "present or future creditors" as in Section 7, or of creditors and "other persons who become creditors" in Section 5, indicates that under Section 4 only present creditors may set aside a conveyance.¹⁸³ The definition of insolvency in Section 2 is sufficiently broad to raise a doubt that the rule in Ohio regarding the amount of property to be retained would be seriously affected. Cases which involve actual intent to defraud are dealt with in a subsequent section.¹⁸⁴

CONVEYANCES BY PERSONS IN BUSINESS

Under the Statute of 13 Elizabeth a special application of the gift rule has been developed for the business man. It is considered to be a badge of fraud for him to make a voluntary conveyance if in so doing he retains so little capital that the risk of his business is cast upon his present or subsequent creditors. In his case it is not an adequate defense that at the time of conveyance his assets were sufficient to satisfy his debts.¹⁸⁵ Nor need his intention to defraud be actual as distinguished from constructive.¹⁸⁶ The rule has specific application when the debtor is about to enter into a new business that involves more than the ordinary amount of risk,¹⁸⁷ or one in which he is inexperienced.¹⁸⁸ It applies as well, though, to an expan-

¹⁸² *Bobilya v. Priddy*, 68 Ohio St. 373, 67 N.E. 736 (1903); *Burgett v. Burgett*, 1 Ohio 469 (1824); *Blackford v. Gaynor*, 50 Ohio App. 494, 198 N.E. 736 (1934). *Re* knowledge of an indorser, see *Cole v. Bank*, 15 Ohio C.C. (N.S.) 315, 341, 342 (1907), *aff'd*, *Bank v. Newton*, 82 Ohio St. 444, 92 N.E. 119 (1910); *Mitchell v. Gazzam*, 12 Ohio 315, 336 (1843).

¹⁸³ *Bank of Dallas v. Peterson*, 218 Wis. 41, 260 N.W. 240, 242 (1935); *Bridgman, Uniform Fraudulent Conveyance Act in Minnesota*, 7 MINN. L. REV. 530, 531 (1922-23). Bankruptcy Act Section 67 d (2) (a) [11 U.S.C. § 107d (2) (a) (1946)] specifically limits a similar provision to "creditors existing at the time of such transfer or obligation." 4 COLLIER, BANKRUPTCY § 67.34 (1942).

¹⁸⁴ See *infra* page 603.

¹⁸⁵ *Mackay v. Douglas*, L.R. 14 Eq. 106 (1872); *Ex parte Russell*, 19 Ch. D. 588, 601 (1882).

¹⁸⁶ See BIGELOW, *op cit. supra* note 2, at 114.

¹⁸⁷ *Mackay v. Douglas*, L.R. 14 Eq. 106 (1872).

¹⁸⁸ *Ex parte Russell*, 19 Ch. D. 588 (1882). See *Todd v. Nelson*, 109 N.Y. 316, 16 N.E. 588 (1888).

sion of an old business or to the incurring of extensive liabilities.¹⁸⁹ The time sequence between the gift and business venture is important¹⁹⁰ but not necessarily controlling.¹⁹¹ The uncertainty of the business, its size and the donor's business experience bear upon the reasonableness of the amount of capital retained.¹⁹²

A conveyance fraudulent under these circumstances can be set aside by existing creditors, and by subsequent ones, too, if their class is actually contemplated.¹⁹³ Such actual intention may be proved by badges of fraud, such as immediate entrance into the business,¹⁹⁴ but may not be imputed if the facts are consistent with honesty.¹⁹⁵ Knowledge of the prior conveyance by subsequent creditors, of course, bars recovery.¹⁹⁶

Although Ohio has held that subsequent creditors may upset a voluntary conveyance made by an insolvent debtor who had them in mind,¹⁹⁷ it seemingly has not developed a separate doctrine that the retention of an unreasonably small capital by a business man will constitute such a fraudulent intent.¹⁹⁸

Section 5 of the Uniform Act states that:

Every conveyance made without fair consideration when the person making it is engaged or is about to engage in a business or transaction for which the property remain-

¹⁸⁹ *Ware v. Gardner*, L. R. 7 Eq. 317 (1869). *Crossley v. Elworthy*, L.R. 12 Eq. 158 (1871); *MAY*, *op. cit. supra* note 4, at 52; 1 *GLENN*, *op. cit. supra* note 28, at 334, 335.

¹⁹⁰ *Sexton v. Wheaton*, 8 Wheat. 229, 251 (U.S. 1823); *BIGELOW*, *op. cit. supra* note 2, at 231; 1 *GLENN*, *op. cit. supra* note 28, § 335.

¹⁹¹ *In re Pearson*, 3 Ch. D. 807 (1876) (Fifteen years elapsed between the conveyance and the engaging in trade).

¹⁹² *Ex parte Russell*, 19 Ch. D. 588 (1882); *Mackay v. Douglas*, L. R. 14 Eq. 106 (1872). But not unforeseen losses as by fire or flood. *Crossley v. Elworthy*, L. R. 12 Eq. 158, 167 (1871); *Cairo Lumber Co. v. Landenberger*, 313 Ill. App. 1, 39 N.E. 2d 596 (1941); *Hunters v. Waite*, 3 Gratt. 25, 45 (Va. 1846). See *Spiret v. Willows*, 3 De. J. & S. 293 (Ch. 1865).

¹⁹³ 1 *MOORE*, *op. cit. supra* note 15, at 188-190; *BIGELOW*, *op. cit. supra* note 2, at 103n (a); *BUMP*, *op. cit. supra* note 3, §§ 291-293; *MAY* *op. cit. supra* note 4, at 521.

¹⁹⁴ *BUMP*, *op. cit. supra* note 3, § 291. Also see *Mullen v. Wilson*, 44 Pa. 413 (1863); *Case v. Phelps*, 39 N.Y. 164 (1868); *Mackay v. Douglas*, *supra* note 185; *Carpenter v. Carpenter*, 25 N.J. Eq. 194 (Ch. 1874).

¹⁹⁵ 1 *MOORE*, *op. cit. supra* note 15, at 189-190.

¹⁹⁶ Knowledge here may be either actual or constructive, except that actual fraud leading the creditor not to investigate requires actual knowledge on the part of the creditor. *Sikes v. First State Bank of Decatur*, 197 S.W. 227 (Tex. Civ. App. 1917). See *German-American National Bank of Lincoln v. Martin*, 277 Ill. 629, 115 N.E. 721 (1917); *Van Nostrand & Co. v. Virginia Zinc & Chemical Corp.*, 126 Va. 131, 101 S.E. 65 (1919).

¹⁹⁷ *Evans v. Lewis*, 30 Ohio St. 11 (1876); *Creed v. Lancaster Bank*, 1 Ohio St. 1 (1852).

¹⁹⁸ *BUMP*, *op. cit. supra* note 3, § 258, refers to *Crumbaugh v. Kugler*, 2 Ohio St. 374 (1853), and *Miller v. Wilson*, 15 Ohio 108 (1846).

ing in his hands after the conveyance is an unreasonably small capital, is fraudulent as to creditors and as to other persons who become creditors during the continuance of such business or transaction without regard to his actual intent.

The rule thus stated in effect codifies existing doctrine,¹⁹⁹ but as to both present and to subsequent creditors bases its conclusion of fraud upon economic conditions as distinguished from a state of mind.²⁰⁰ Consequently insufficiency of assets may not be explained away.²⁰¹ But the results of the cases have probably not been altered,²⁰² since circumstances which formerly would have sustained a finding of fraud, still enter into the determination of what constitutes an "unreasonably small capital."²⁰³

CONVEYANCES BY A PERSON ABOUT TO INCUR DEBTS

Voluntary conveyances by persons who expect to incur debts may be fraudulent under the Act. This is the case when the debtor knows that his contemplated indebtedness will exceed his ability to pay.²⁰⁴ The rule then applies that subsequent creditors may avoid voluntary conveyances which are made with them in mind.²⁰⁵ If the evidence shows that the donor intended to defraud his future creditors, existing ones may object,²⁰⁶ but when the intention to defraud is confined to existing creditors, the position of subsequent ones is not uniformly clear. The so-called English rule aided them as long as existing debts remained unpaid,²⁰⁷ and in any event circum-

¹⁹⁹ Expansion of an old business suffices. *McBride v. Bertsch*, 58 F. 2d 797, *aff'd*, 58 F. 2d 799 (C. C. A. 6th 1932); or even continuance of the old one upon the same scale. *Fidelity Trust Co. v. Union National Bank*, 313 Pa. 467, 169 Atl. 209 (1933). Knowledge of the transfer is a defense. *Long v. True*, 149 Tenn. 673, 261 S.W. 669 (1924); but not constructive knowledge based upon recording. *McBride v. Bertsch*, *supra*. It is not necessary that the donor be rendered insolvent. *Fidelity Trust Co. v. Union National Bank*, *supra*. See 44 A.B.A. REP. 343 n. 3 (1919); 1 GLENN, *op. cit. supra* note 28, §§ 334, 335.

²⁰⁰ *Kearney Plumbing Supply Co. v. Gland*, 105 N.J. Eq. 723, 149 Atl. 530 (Ch. 1930). The provision is constitutional. *McBride v. Bertsch*, *supra* note 199.

²⁰¹ *Kearney Plumbing Supply Co. v. Gland*, *supra* note 200.

²⁰² See 44 A.B.A. REP. 343 n. 3 (1919); 1 GLENN, *op. cit. supra* note 28, § 335.

²⁰³ See 1 GLENN, *op. cit. supra* note 28, §§ 334, 335.

²⁰⁴ *Morrill v. Kilner*, 113 Ill. 318 (1885); *Matthai v. Heather*, 57 Md. 483 (1881); *In re Ridler*, 22 Ch. D. 74 (1882); *Bump*, *op. cit. supra* note 3, §§ 290, 291, 293.

²⁰⁵ BIGELOW, *op. cit. supra* note 2, at 103 n. a (II). See *Wilson v. Stevens*, 129 Ala. 630, 29 So. 678 (1900); *Bishop v. Redmond*, 83 Ind. 157, 159 (1882); *Barkworth v. Palmer*, 118 Mich. 50, 55, 76 N.W. 151 (1898).

²⁰⁶ *Spirett v. Willows*, 3 De J. & S. 293 (1865).

²⁰⁷ *Freeman v. Pope*, 5 L. R. Ch. 538 (1870); extended by *Taylor v. Coenen*, 1 Ch. D. 636 (1876); *Jenkyn v. Vaughn*, 3 Drew. 419, 425 (Ch. 1856);

stances which would sustain an intent to defraud existing creditors may include subsequent ones.²⁰⁸ Thus retention of possession by the donor²⁰⁹ or the immediate incurring of debts²¹⁰ are evidentiary.

When fraud as to existing creditors is actual as distinguished from constructive,²¹¹ some courts permit subsequent creditors to object.²¹² Others require a direct showing of fraud as to their class.²¹³ Constructive fraud²¹⁴ must be directed toward the subsequent creditor. The intent at the time of conveyance governs,²¹⁵ and knowledge of the conveyance will defeat the right of a subsequent creditor.²¹⁶ Insolvency or indebtedness of the grantor when the conveyance is made is not a prerequisite,²¹⁷ nor does insolvency, present or future, necessarily establish intent to incur debts beyond

1 GLENN, *op. cit. supra* note 28, § 322. See 37 HARV. L. REV. 489 (1924); 18 ENG. RUL. CAS. 79 (1899).

²⁰⁸ Claffin v. Mess, 30 N. J. Eq. 211, 212 (Ch. 1878); Johnston v. Zane, 11 Gratt. 552, 559 (Va. 1854); BUMP, *op. cit. supra* note 3, § 295. See Redfield v. Buck, 35 Conn. 328, 338 (1868).

²⁰⁹ Carter v. Grimshaw, 49 N. H. 100, 106 (1869); BUMP, *op. cit. supra* note 3, § 291; 1 GLENN, *op. cit. supra* note 28, § 346.

²¹⁰ Herschfeldt v. George, 6 Mich. 456 (1859); Johnson v. Zane, 11 Gratt. 552, 561 (Va. 1854); Rose v. Brown, 11 W. Va. 122 (1877); Barling v. Bishopp, 29 Beav. 417, 420 (1860).

²¹¹ Rudy v. Austin, 56 Ark. 73, 19 S. W. 11 (1892); Johnston v. Zane, 11 Gratt. 552, 559 Va. 1854; BUMP, *op. cit. supra* note 3, § 295. See Redfield

²¹² Day v. Cooley, 118 Mass. 524 (1875); Washington National Bank v. Beatty, 77 N. J. Eq. 252, 76 Atl. 442 (Ct. Err. & App. 1910); Marshall v. Roll, 139 Pa. 399, 20 Atl. 999 (1891); 1 GLENN, *op. cit. supra* note 28, § 324; BIGELOW, *op. cit. supra* note 2, at 104-105 n. a III. See Fish v. East, 114 F. 2d 177 (C. C. A. 10th 1940); Nicholas v. Ward, 1 Head 324 (Tenn. 1858).

²¹³ Bates v. Kleve, 225 Iowa 255, 280 N. W. 501 (1938); Fullington v. Northwestern Importers & Breeders Assoc., 48 Minn. 490, 51 N. W. 475 (1892). There is no requirement that the grantor have specific debts in mind. Winchester v. Charter, 94 Mass. 606, 611 (1866).

²¹⁴ Bates v. Kleve, *supra* note 213; BUMP, *op. cit. supra* note 3, § 295; BIGELOW, *op. cit. supra* note 2, at 100. See State v. Martin, 77 Conn. 142, 58 Atl. 745 (1904).

²¹⁵ Phifer v. Erwin, 100 N. C. 59, 6 S. E. 672 (1888); Sommerville v. Horton, 4 Yerg. 541, 548 (Tenn. 1833). See Rose v. Colter, 76 Ind. 590 (1881); Weller v. Wayland, 17 Johns. 102 (N. Y. 1819). In the case of a voluntary conveyance it is the intent of the grantor, not the knowledge of the grantee, that controls. Partridge v. Goop, 2 Amb. 595, 598 (Ch. 1758).

²¹⁶ Knowledge may be either actual or constructive, except that actual fraud leading the creditor not to investigate requires actual knowledge on the part of the creditor. Sikes v. First State Bank of Decatur, 197 S. W. 227 (Tex. Civ. App. 1917). See German-American National Bank of Lincoln v. Martin, 277 Ill. 629, 115 N. E. 721 (1917); Van Nostrand & Co. v. Virginia Zinc and Chemical Corp., 126 Va. 131, 101 S. E. 65 (1919); BUMP, *op. cit. supra* note 3, §§ 293, 462.

²¹⁷ Morritz v. Hoffman, 35 Ill. 553, 558 (1864); Matthai v. Heather, *supra* note 204; Stileman v. Ashdown, 2 Atk. 477, 480 (Ch. 1742).

ability to pay.²¹⁸ Inadequacy of consideration may result in a conveyance that is voluntary in part.²¹⁹

As stated in the previous section, for a subsequent creditor in Ohio to avail himself of a fraudulent conveyance, he must show that his class was contemplated²²⁰ when the conveyance was made.²²¹ Proof of this intention may rest upon circumstances,²²² for it is said that one is presumed to intend the necessary consequences of his act.²²³ So stated, the rule has been recognized as applicable to a voluntary conveyance made with the intention of incurring debts. Solvency at the time of conveyance is no defense.²²⁴

Section 6 of the Uniform Act provides that:

Every conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors.

This provision codifies the rule just discussed.²²⁵ The state of mind may be proved by badges of fraud,²²⁶ but insolvency alone is not sufficient evidence;²²⁷ nor will recordation of a deed charge a

²¹⁸ *Rudy v. Austin*, 56 Ark. 73, 19 S.W. 11 (1892); *DeFeo v. Hindinger*, 98 Conn. 578, 120 Atl. 314 (1923); *Lyman v. Cessford*, 15 Iowa 229, 231 (1863); *In re Lane-Fox*, 2 Q. B. 508, (1900); *Smith v. Tatton*, 6 L. R. Ir. 32 (1879). See *Pelham v. Aldrich*, 8 Gray 515 (Mass. 1857); *Cole v. Brown*, 114 Mich. 396, 72 N. W. 247 (1897); *Hagerman v. Buchanan*, 45 N. J. Eq. 292, 17 Atl. 946 (Ct. Err. & App. 1889); *BUMP, op. cit. supra* note 3, §§ 292, 295. A showing of sufficient debts at time of the conveyance may also be used as evidence of fraud as to subsequent creditors. *Rudy v. Austin, supra* at 81.

²¹⁹ *Norton v. Norton*, 59 Mass. 524, 530 (1850); *BUMP, op. cit. supra* note 3, § 265.

²²⁰ See note 179, *supra*.

²²¹ *Robinson v. Von Dolcke*, 1 Ohio N. P. 429, 3 Ohio Dec. (N.P.) 107 (1894).

²²² *First National Bank v. Trebein*, 59 Ohio St. 316, 52 N. E. 834 (1898); *Jamison v. McNally*, 21 Ohio St. 295, 304 (1871); *Sechrist v. Veres*, 9 Ohio Op. 492, 497 (C. P. 1937).

²²³ *First National Bank v. Trebein, supra* note 222; *Sechrist v. Veres, supra* note 222; *Jones v. Leeds*, 7 Ohio N. P. 480 (1900); *Maas v. Miller*, 58 Ohio St. 483, 51 N. E. 158 (1898); *Jamison v. McNally, supra* note 222.

²²⁴ *Webb v. Roff*, 9 Ohio St. 430, 435 (1859). See *Hedrick v. Gregg*, 8 Ohio N. P. 24, 10 Ohio Dec. (N. P.) 462 (1901); *Bowlus v. Shanabarger*, 19 Ohio C. C. 137, 10 Ohio Dec. 167 (1900).

²²⁵ See *Cram v. Cram*, 262 Mass. 509, 160 N. E. 337 (1928); *Decker's Estate*, 149 Misc. 364, 268 N. Y. Supp. 280 (Surr. Ct. 1933); *Hartnett v. Doyle*, 16 Tenn. App. 302, 64 S. W. 2d 227 (1932).

²²⁶ *Hartnett v. Doyle, supra* note 225.

²²⁷ *Anderson v. Anderson*, 103 P. 2d 452 (Cal. App. 1940).

subsequent creditor with knowledge.²²⁸ The Act seems clearly to modify the rule of states, such as Ohio,²²⁹ which requires a specific showing of fraud as to subsequent creditors.²³⁰

CONVEYANCES MADE WITH INTENT TO DEFRAUD

When transfers were avoided under the Statute of Elizabeth for actual intention to defraud, the main difficulty concerned the rights of subsequent creditors. It was held generally that actual fraud as to a subsequent creditor will enable him to upset a conveyance,²³¹ and further assistance has been granted to him. As noted,²³² the English rule aided him as long as existing debts remained unpaid.²³³ By the Massachusetts rule²³⁴ subsequent creditors may upset a fraudulent conveyance although their class is not within the actual intention of the grantor. In other states subsequent creditors must be within the grantor's fraudulent intent.²³⁵ If the transfer is gratuitous, knowledge of the fraud by the grantee is

²²⁸ *Hartnett v. Doyle*, *supra* note 225. It has been suggested that actual notice to the subsequent creditor would not defeat his claim. COLLIER, *BANKRUPTCY*, *op. cit. supra* note 10, § 67.36 n. 5.

²²⁹ In *Webb v. Roff*, 9 Ohio St. 430, 435 (1859), the rule is stated as follows: "Thus, if one possessed of property and of good credit should make a voluntary conveyance of his property with a view to becoming subsequently indebted, and should by means of his former reputation contract debts shortly after the conveyance of his property, the creditors being ignorant of the fact, the fraud might well be regarded as directed specifically against such subsequent creditors."

²³⁰ There is contra authority. *Oakford Realty Co. v. Boarman*, 156 Md. 65, 143 Atl. 644 (1928); *Neeb v. Atlantic Mill & Lumber Realty Co.*, 176 Md. 297, 5 A. 2d 283 (1939). It should be apparent that upon occasions sections 5 and 6 may apply in the alternative. *Williams v. Euhler*, 222 App. Div. 561, 227 N. Y. Supp. 40 (2d Dep't 1928); 1 GLENN, *op. cit. supra* note 28, at 580.

²³¹ *BUMP*, *op. cit. supra* note 3, § 24; *BIGELOW*, *op. cit. supra* note 2, at 85-86.

²³² See note 211, *supra*. But actual intent as to future creditors will be sufficient even when no present debts are unpaid at the time of conveyance. *Murphy v. Abraham*, 15 Ir. Ch. 371 (1863); *In re Pearson*, 3 Ch. D. 807 (1876).

²³³ The rule in some states based the right of subsequent creditors to sue upon the continuance of the debtor's insolvency as distinguished from the survival of unpaid debts. *BIGELOW*, *op. cit. supra* note 2, at 103 n. (a).

²³⁴ *Fish v. East*, 114 F. 2d 177 (C. C. A. 10th 1940); *Hannaford v. Charles River Trust Co.*, 248 Mass. 225, 142 N. E. 822 (1924); *Washington National Bank v. Beatty*, 77 N. J. Eq. 252, 76 Atl. 442 (Ct. Err. & App. 1910); *Nicholas v. Ward*, 1 Head 324 (Tenn. 1858); *House v. Johnson*, 19 Colo. App. 524, 76 Pac. 743 (1904); 1 GLENN, *op. cit. supra* note 28, § 324; *BIGELOW*, *op. cit. supra* note 2, at 104-105 n. a III. See *Marshall v. Roll*, 139 Pa. 399, 20 Atl. 999 (1891); *Moore v. Bay*, 284 U. S. 4 (1931); 45 HAR. L. REV. 579 (1932).

²³⁵ *Bates v. Kleve*, 225 Iowa 255, 280 N. W. 501 (1938); *Fullington v. Northwestern Importers & Breeders Assoc.*, 48 Minn. 490, 51 N. W. 475 (1892).

not controlling,²³⁶ but a transfer for a valuable consideration may not be upset if the transferee is innocent.²³⁷ Intention at the date of transfer governs.²³⁸

Ohio, as stated, follows the general rule that knowledge by a donee is immaterial,²³⁹ but it is otherwise when a valuable consideration is involved.²⁴⁰ Consistently with its general doctrine, subsequent creditors must show that the fraudulent intent includes them.²⁴¹

Section 7 of the Uniform Act reads:

Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors.

Although the section is silent as to the grantee's participation in the fraud,²⁴² the general rule applies that his innocence is unimportant in a voluntary transfer,²⁴³ but becomes important when there is a valuable consideration.²⁴⁴ Badges of fraud, expressly re-

²³⁶ *Partridge v. Gopp*, 2 Amb. 595 (Ch. 1758); 1 GLENN, *op. cit. supra* note 28, §§ 234, 250; BIGELOW, *op. cit. supra* note 2, at 80.

²³⁷ *In re Johnson*, 20 Ch. D. 289, 392 (1881); *Midleton v. Pollock*, 2 Ch. D. 104, 108 (1876); 1 GLENN, *op. cit. supra* note 28, §§ 234, 250, 295. Notice, actual or constructive, of the grantor's intent is sufficient. *Manwaring v. O'Brien*, 75 Minn. 542, 78 N. W. 1 (1899); *Kansas Moline Plow Co. v. Sherman*, 3 Okla. 204, 41 Pac. 623 (1895). See *Magniac v. Thompson*, 7 Pet. 348, 394 (U. S. 1833).

²³⁸ *Ray v. Simons*, 76 Ind. 150 (1881); *Walker v. Burrows*, 1 Atk. 93 (Ch. 1745); BUMP, *op. cit. supra* note 3, § 33. See 2 MOORE, *op. cit. supra* note 15, at 608.

²³⁹ *Supra* note 148. See also *Miller v. Wilson*, 15 Ohio 108, 115 (1846); *Friedel v. Wolffe*, 41 Ohio App. 564, 180 N. E. 738 (1931).

²⁴⁰ Notes 139-141 *supra*. See *Bobilya v. Priddy*, 68 Ohio St. 373, 67 N. E. 736 (1903) (REV. STAT. § 6343); *Burgett v. Burgett*, 1 Ohio 469, 482 (1824) (predecessor to General Code Section 8618); *Friedel v. Wolffe*, 41 Ohio App. 564, 180 N. E. 738 (1931); *Underwood v. Lapp*, 29 Ohio L. Abs. 582 (1939); *Gould v. Cooper*, 15 Ohio App. 223, 32 Ohio C. A. 241 (1919); *Hamill v. Wright*, 5 Ohio N. P. 9, 8 Ohio Dec. (N. P.) 467 (1897).

²⁴¹ See notes 220-223 *supra*.

²⁴² The Uniform Act, Section 7, like Ohio General Code, Section 8618, but unlike the Statute of 13 Elizabeth, does not specifically save a transfer because of the grantee's good faith. Cf. UNIFORM FRAUDULENT CONVEYANCE Act § 9.

²⁴³ *Hersh v. Levinson Bros.*, 117 N. J. Eq. 131, 174 Atl. 736 (Ct. Err. & App. 1934); *In re Rasmussen's Estate*, 238 Wis. 334, 298 N. W. 172 (1941).

²⁴⁴ *Drury v. State Capital Bank*, 163 Md. 84, 161 Atl. 176 (1932); *Hersh v. Levinson Bros.*, *supra* note 243; *Queen-Favorite Bldg. Assoc. v. Burstein*, 310 Pa. 219, 165 Atl. 13 (1933). See *Heller, Colorable Transfers, Fraudulent Conveyances, and Preferences in State and Federal Liquidation Proceedings*. [1939] Wis. L. Rev. 360, 368.

jected as presumptions, remain as evidence of the state of mind.²⁴⁵ The section adopts the Massachusetts rule, and extends its remedy to subsequent creditors even though they were not within the grantor's contemplation.²⁴⁶ This provision would change Ohio law.

CONVEYANCES OF PARTNERSHIP PROPERTY

When not complicated by the fact of insolvency or by the special doctrines of insufficient capital or of an intention to incur future debts, there is no inherent wrong in the voluntary conveyance of partnership assets to a partner,²⁴⁷ or to the consensual use of such assets to pay a partner's individual debts.²⁴⁸ When insolvency is present, however, problems arise concerning the so-called aggregate and entity theories of partnerships.²⁴⁹ Since partners may waive the rule that firm creditors shall be preferred out of firm assets,²⁵⁰ the use of firm assets to pay a partner's debt is held by some courts to create simply a preference at common law.²⁵¹ By others such a transfer is classed as a fraud upon creditors²⁵²—a view

²⁴⁵ The following have been considered as evidence of fraudulent intent: *Shapiro v. Wilgus*, 287 U. S. 348 (1932) (formation of a corporation so that a receiver may be appointed); *Wilson v. Robinson*, 83 F. 2d 397 (C. C. A. 2d 1936) (grossly inadequate considerations); *Lackawanna Pants Mfg. Co. v. Wiseman*, 133 F. 2d 482, 486 (C. C. A. 6th 1943); *Oakford Realty Co. v. Boarman*, 156 Md. 65, 143 Atl. 644 (1928) (false representations); *Anderson v. Chapman*, 215 Mich. 80, 183 N. W. 908 (1921) (secret option to repurchase). See *Timmer v. Pietrzyk*, 272 Mich. 238, 261 N. W. 313 (1935) (act not cited).

²⁴⁶ *McLaughlin, Application of The Uniform Fraudulent Conveyance Act*, 46 HARV. L. REV. 404, 430 (1933); 1 GLENN, *op. cit. supra* note 28, §§ 324, 326; *But cf. Oakford Realty Co. v. Boarman*, 156 Md. 65, 143 Atl. 644 (1928); *Neeb v. Atlantic Mill & Lumber Co.*, 176 Md. 297, 5 A. 2d 283, 287 (1939).

²⁴⁷ *Ex parte Ruffin*, 6 Ves. 119 (1801); BATES, *LAW OF PARTNERSHIP* §§ 559, 560 (1888); *Dodd, Dogma and Practice in the Law of Associations*, 42 HARV. L. REV. 977, 997 (1929). See *Darby v. Gilligan*, 33 W. Va. 246, 10 S. E. 400 (1889).

²⁴⁸ *Ellison v. Lucas and McDuffie*, 87 Ga. 223, 13 S. E. 445 (1891); *Woodmansie v. Holcomb*, 34 Kan. 35, 7 Pac. 603 (1885). See CRANE, *PARTNERSHIPS* 177 (1938).

²⁴⁹ CRANE, *id.* § 3; BATES, *LAW OF PARTNERSHIPS* §§ 170-179 (1888); MECHEM, *ELEMENTS OF THE LAW OF PARTNERSHIP* § 6 (2d ed. 1920); Cowles, *The Firm as a Legal Person*, 57 CENT. L. J. 343 (1903).

²⁵⁰ MECHEM, *id.* § 436; CRANE, *id.* at 179.

²⁵¹ *First National Bank of Indianola v. Brubaker*, 128 Iowa 587, 105 N. W. 116 (1905); *Goddard-Peck Grocery Co. v. McCune*, 122 Mo. 426, 25 S. W. 904 (1898); *Sargent v. Blake*, 160 Fed. 57 (C. C. A. 8th 1908); *Crane, The Uniform Partnership Act, A Criticism*, 28 HARV. L. REV. 762, 775-776 (1915); 1 GLENN, *op. cit. supra* note 28, § 219.

²⁵² *Bank v. Durfey*, 72 Miss. 971, 18 So. 456 (1895); 1 BATES, *op. cit. supra* note 249, § 566; CRANE, *op. cit. supra* note 248, at 179-180.

that is more clearly demonstrable under the entity theory.²⁵³

A further complication occurs when firm assets are transferred to a partner who assumes the firm debts. In this case some courts, following the aggregate theory, consider the assumption of debts as properly supporting the transfer.²⁵⁴ Others call it a fraudulent conveyance, with or without resort to the entity theory.²⁵⁵

In Ohio a conveyance of firm assets to a partner's creditor is classed as preferential but not necessarily as fraudulent,²⁵⁶ and a conveyance to a partner upon assumption of firm debts is not improper.²⁵⁷

The Uniform Act proposes in Section 8 that:

Every conveyance of partnership property and every partnership obligation incurred when the partnership is or will be thereby rendered insolvent, is fraudulent as to partnership creditors, if the conveyance is made or obligation is incurred, (a) To a partner, whether with or without a promise by him to pay partnership debts, or (b) To a person not a partner without fair consideration²⁵⁸ to the partnership as distinguished from consideration to the individual partners.²⁵⁹

²⁵³ *Roop v. Herron*, 15 Neb. 73, 17 N. W. 353 (1883); *Dodd, Dogma and Practice in the Law of Associations*, 42 HARV. L. REV. 977, 997 (1929); *MECHEM*, *op. cit. supra* note 249, §§ 443, 444; 39 HARV. L. REV. 247, 249 (1925).

²⁵⁴ *In re Suprenant*, 217 Fed. 470 (N. D. N. Y. 1914). Assumption of debts is not always held requisite. "In accordance with the general rule before stated, it has been steadily held that one partner may in good faith convey his interest in partnership assets to another, and that thereby all equities of such partner and of all partnership creditors to subject such assets first to the payment of their claims is thereby lost." *Wiggins v. Blackshear*, 86 Tex. 665, 26 S. W. 939, 940 (1894). *MECHEM*, *op. cit. supra* note 249, § 447.

²⁵⁵ Because of insolvency the consideration fails and the transfer is voluntary. *Darby v. Gilligan*, 33 W. Va. 246, 10 S. E. 400 (1889); *Prior lien of creditors held not to be divested. Peyser v. Myers*, 135 N. Y. 599, 32 N. E. 699 (1892). See *Ex parte Mayou*, 4 DeG. J. & S. 664 (1865). The general problem of partnership transactions as fraudulent conveyances is discussed: *Crane, The Uniform Partnership Act, A Criticism*, 28 HARV. L. REV. 762, 774-776 (1915); *Lewis, The Uniform Partnership Act—A Reply to Mr. Crane's Criticism*, 29 HARV. L. REV. 158, 291, 296-298 (1915); *Dodd, Dogma and Practice in the Law of Associations*, 42 HARV. L. REV. 977, 997 (1929); 1 *BATES*, *op. cit. supra* note 249, §§ 562, 568.

²⁵⁶ *Sigler v. Knox County Bank*, 8 Ohio St. 511 (1858); *Citizen's Nat. Bank v. Wehrle*, 18 Ohio C. C. 535, 9 Ohio C. D. 330 (1897), *aff'd without opinion*, 61 Ohio St. 654, 57 N. E. 1131 (1899).

²⁵⁷ *Miller v. Estill*, 5 Ohio St. 508, 517 (1856); *Pfirman v. Koch*, 13 Ohio Dec. Rep. 660 (1871).

²⁵⁸ *Liebowitz v. Arrow Roofing Co.*, 259 N. Y. 391, 182 N. E. 58 (1932). See *Hartnett v. Doyle*, 16 Tenn. App. 302, 64 S. W. 2d 227 (1932).

²⁵⁹ It is not clear to what extent the grantee is obliged to assure himself that the consideration paid shall benefit the partnership rather than the individual partners. See 4 *COLLIER*, *op. cit. supra* note 10, at 321; *CRANE*, *op. cit. supra* note 248, at 180, 183; 1 *GLENN*, *op. cit. supra* note 28, §216. In sub-

These provisions would change the law in Ohio. Further, it should be recalled that while Section 2 defines partnership insolvency upon the aggregate theory, Section 8 treats the firm as an entity insofar as fraudulent conveyances are concerned.²⁶⁰ The phrasing of subsection (a) should also be noted. Its terms are broad enough to ban a cash sale of goods for equal value by an insolvent partnership to one of its members—a proposal which is remarkable if true, inasmuch as a transfer for equivalent value would be involved.²⁶¹

MATURED AND UNMATURED CLAIMS

Distinguished from the rights of present and subsequent creditors under the Statute of 13 Elizabeth is the availability of remedies, dependent upon the maturity of the claim and its reduction to judgment. Ordinarily before equity will set aside a fraudulent conveyance,²⁶² it requires the claim to be in judgment.²⁶³ Statutes in some states have changed this rule,²⁶⁴ but not in the case of tort claims.²⁶⁵

stance the definition is adopted in Section 67d(4) of the Bankruptcy Act, 11 U. S. C. § 107d(4) (1946).

²⁶⁰ See note 91 *supra*.

²⁶¹ This section "declares fraudulent, as to partnership creditors, any transfer of partnership assets or any partnership obligation incurred (a) to a partner. . . .": 4 COLLIER, *op. cit. supra* note 10, at 315; CRANE, *op. cit. supra* note 248, at 180-183; 1 GLENN, *op. cit. supra* note 28, § 219.

²⁶² *Wiggins v. Armstrong*, 2 Johns. Ch. 144 (N. Y. 1816); *Fleming v. Grafton*, 54 Miss. 79 (1876); *Wadsworth v. Schisselbauer*, 32 Minn. 84, 19 N. W. 390 (1884); 1 GLENN, *op. cit. supra* note 28, § 85; 42 YALE L. J. 288 (1932). Subsidiary problems are indicated: necessity for exhausting legal remedies, 2 MOORE, *op. cit. supra* note 15, at 770; 1 GLENN, *op. cit. supra* note 28, §§ 67, 86; sufficiency of a foreign judgment, 2 MOORE, *id.* at 780-782; need for a lien, 2 MOORE, *id.* at 802-805, *BUMP, op. cit. supra* note 3, at 535, 34 A. S. R. 855; existence of a lien as excusing lack of judgment, 2 MOORE, *op. cit. supra* note 15, at 782-785; county in which execution should be served, 23 L.R.A. (N.S.) 64; insolvency or non-residence as excusing lack of judgment, *White v. Exchange Nat. Bank*, 172 Okla. 331, 44 P. 2d 935 (1937); *Humphrey v. McCleary*, 159 Minn. 535, 198 N. W. 132 (1924); 2 MOORE, *op. cit. supra* note 15, at 787; or when the grantor is deceased, 103 A.L.R. 555, 23 L.R.A. (N.S.) 92; need for resort to other assets or to sue joint obligors, 2 MOORE, *op. cit. supra* note 15, at 805, 808; effect of death of grantee, 25 VA. L. REV. 232 (1938).

²⁶³ In England a simple contract creditor may have a fraudulent conveyance set aside, but a judgment is necessary if property is to be applied to satisfaction of a debt. *Reese River Silver Mining Co. v. Atwell*, L.R. 7 Eq. 347 (1869); *MacDonald v. McCall*, 9 Ont. L. R. 185 (1885); *Angell v. Draper*, 1 Vern. 398 (1686); *Colman v. Croker*, 1 Ves. 160 (1790). Cf. *MAX, op. cit. supra* note 4, at 527.

²⁶⁴ *Bromberg v. Heyer*, 69 Ala. 22 (1881); *Phelps v. Smith*, 116 Ind. 387, 17 N.E. 602 (1888). See *Cocks v. Varney*, 45 N.J. Eq. 72, 17 Atl. 108 (Ch. 1889); 1 GLENN, *op. cit. supra* note 28 §§ 79, 80, 85.

²⁶⁵ *Nelson v. Smith*, 157 Ore. 292, 69 P. 2d 1072 (1937), 24 VA. L. REV. 197 (1937); 6 MISS. L. J. 279 (1934); 1 GLENN, *op. cit. supra* note 28, § 81.

Remedy is in the alternative of levy and sale,²⁶⁶ or as suggested, in equity to set aside the transfer.²⁶⁷ An action for damages against the grantee is sometimes proper.²⁶⁸ Since a fraudulent transfer is usually valid between the parties,²⁶⁹ the surplus over that needed to pay debts belongs to the grantee or donee;²⁷⁰ and when the consideration is valuable but inadequate, equity treats the property so conveyed as security to the extent of the amount actually paid.²⁷¹

In Ohio when an action is brought under Sections 11104-11106 "for the equal benefit of the creditors," it is immaterial whether the petitioner's claim "has matured or will thereafter mature."²⁷²

Cf. 43 W. VA. L. Q. 225 (1937). Some states, including Ohio [Smith v. Buck, 119 Ohio St. 101, 162 N.E. 382 (1928,)] will allow attachment in this case. OHIO GEN. CODE § 11819 (1938). But under the fraudulent conveyance statutes, the tort claimant in Ohio must first proceed to judgment. Sechrist v. Veres, 9 Ohio Op. 492 (C.P. 1937).

²⁶⁶ The basis for this is that the conveyance is void. Gooch's Case, 3 Co. 121, 5 Co. 60a (1559); 2 MOORE, *op. cit. supra* note 15, at 731, 739; BUMP, *op. cit. supra* note 3, at 530. Not all courts so hold. Cf. Foley v. Ruley, 50 W. Va. 158, 40 S.E. 382 (1901); Eckert v. Wendel, 120 Tex. 618, 40 S.W. 2d 796 (1931). For difficulties and limitations see 1 GLENN, *op. cit. supra* note 28, §§ 69n, 239, 239a. *Re* attachment of grantee's estate. 1 GLENN, *id.* at 162a.

²⁶⁷ BUMP, *op. cit. supra* note 3, § 532; 2 MOORE, *op. cit. supra* note 15, at 758. As to injunctions and receiverships: 90 Am. Dec. 296 (1886); UNIFORM FRAUDULENT CONVEYANCE ACT § 10; 2 MOORE, *id.* at 1045-1050.

²⁶⁸ Murtha v. Curley, 90 N.Y. 372 (1882); 2 MOORE, *op. cit. supra* note 15 at 756. Cf. 1 GLENN, *op. cit. supra* note 28, § 74; 18 COL. L. REV. 363 (1918); 24 VA. L. REV. 795 (1937); 27 HARV. L. REV. 181 (1913).

²⁶⁹ Radin, *Fraudulent Conveyances in California and the Uniform Fraudulent Conveyance Act*, 27 CALIF. L. REV. 1, 11 (1939). Cf. attorney and client, Ford v. Harrington, 16 N.Y. 285 (1857). See note 7 *supra*.

²⁷⁰ Burtch v. Elliot, 3 Ind. 99 (1851); Wood v. Hunt, 38 Barb. 302 (N.Y. 1862).

²⁷¹ BUMP, *op. cit. supra* note 3, § 532. See 27 VA. L. REV. 1062, 1063 (1941); Harris, *Some Aspects of Fraudulent Conveyances in Alabama*, 6 ALA. LAW. 170, 172 (1945). The grantee may not so use the property if actual fraud is involved. *Re* fraudulent grantee's expenditures for necessary repairs, taxes, payment of incumbrances see Loos v. Wilkinson, 113 N.Y. 485, 21 N.E. 392 (1889); 1 GLENN, *op. cit. supra* note 28, §§ 243-259. But if the transfer was for full value and bona fide, the conveyance is valid. Harrods, Ltd. v. Stanton, 1 K.B. 516 (1923).

²⁷² "Any creditor or creditors, as to whom any of the acts or things prohibited in the next four preceding sections are void, whether the claim of such creditor or creditors has matured or will thereafter mature, may commence an action . . ." (Emphasis supplied.) OHIO GEN. CODE § 11106 (1938). For actions under Revised Statutes 6343, predecessor of Ohio General Code Sections 11104-11106, see Combs v. Watson, 32 Ohio St. 228 (1877); The Gem City Acetylene Generator Co. v. Coblentz, 86 Ohio St. 199, 99 N.E. 302 (1912); Bloomingdale v. Stein, 42 Ohio St. 168 (1884). Cf. Hegler v. Grove, 63 Ohio St. 404, 59 N.E. 162 (1900). Legal remedies are also available. The land may be attached. Gormley v. Potter, 29 Ohio St. 597 (1876); Bailey v. Swain, 45 Ohio St. 657, 16 N.E. 370 (1888). And it is

No such statement is contained in Section 8618, and unless the quoted provision of Section 11106 is applicable to an action under Section 8618, the ordinary requirement of judgment would seem to apply.²⁷³

As under the Statute of Elizabeth, so in Ohio for creditors or their representatives to set aside a fraudulent conveyance²⁷⁴ injury must be shown.²⁷⁵ A surety is classed as a creditor,²⁷⁶ but an unliquidated-tort claimant is not.²⁷⁷ Purchasers for value and in good faith from the grantor²⁷⁸ or grantee²⁷⁹ are protected, and the remedy subject to the lien of a judgment against the grantor. "If a debtor alien his lands, with the intent, and for the purpose of defrauding his creditors, such alienation, as against such creditors, is void, and the estate is considered as remaining in the debtor for all purposes beneficial to the creditor. It may be attached, if the debtor absconds; is subject to the lien of a judgment; and is in every way liable to be appropriated to the payment of the creditor, in the same manner as if no conveyance had been made." *Barr v. Hatch*, 3 Ohio 527, 530 (1828).

²⁷³ In *Pennell v. Walker*, 68 Ohio App. 533, 36 N.E. 2d 150 (1941), the court assumed the applicability of Ohio General Code Section 11106 to an action under Section 8618, but held that prior to judgment a recipient of personal injuries was not a creditor under its provisions. The restrictive wording of Section 11106 (note 272 *supra*) was not discussed. *Allen v. Toth*, 22 Ohio L. Abs. 457 (App. 1935) held that *lack of knowledge* as a defense under Section 11105 was not available in an action to set aside a gift under Section 8618. The court said at page 462, "Sec. 8618 G. C. is not *limited* by the provisions of Sec. 11105 G. C. or any other statutory enactment." (Emphasis supplied.) For similar statements regarding the defense of Ohio General Code Section 11105 see *Blackford v. Gaynor*, 50 Ohio App. 494, 198 N.E. 736 (1934); *Huwe v. Knecht*, 10 Ohio App. 487 (1919); *State ex rel. Fulton v. Loar*, 21 Ohio L. Abs. 156 (App. 1934).

²⁷⁴ *Re creditors* see Ohio General Code Section 11104. Under Ohio General Code Section 8618 or its predecessors see *Burgett v. Burgett*, 1 Ohio 469 (1824); *Westerman v. Westerman*, 25 Ohio St. 500, 509 (1874); *Gormley v. Potter*, 29 Ohio St. 597 (1876). As to representatives of creditors see *Sayle v. Guarantee Savings & Loan Co.*, 2 Ohio C.C. (N.S.) 401, 25 Ohio C.D. 503 (1904), *aff'd without opinion*, 72 Ohio St. 639, 76 N.E. 1125 (1905). Ordinarily a creditor may not sue after appointment of an assignee. *Hollowell & Co. v. Bayliss*, 10 Ohio St. 536 (1860); *Cornell v. Sulter*, 3 Ohio C.C. (N.S.) 570, 13 Ohio C.D. 384 (1901). Cf. OHIO GEN. CODE § 11107 (1938). But the authority granted to a deceased debtor's personal representative [OHIO GEN. CODE § 10510-49 (1938)] to set aside fraudulent conveyances of land does not prevent suits by creditors. *Hause v. Coblentz*, 22 Ohio App. 17, 153 N.E. 255 (1926); *Hoffman v. Kiefer*, 19 Ohio C.C. 401, 10 Ohio C.D. 304 (1899). See note 43 *supra*.

²⁷⁵ See *Wright v. Snell*, 22 Ohio C.C. 86, 12 Ohio C.D. 308 (1901). This is the ordinary rule. 1 MOORE, *op. cit. supra* note 15, at 84.

²⁷⁶ *Kerber v. Ruff*, 3 Ohio N.P. 165, 4 Ohio C.D. 406 (1896).

²⁷⁷ *Pennell v. Walker*, 68 Ohio App. 533, 36 N.E. 2d 150 (1941); 28 VA. L. REV. 95 (1941); *Sechrist v. Veres*, 9 Ohio Op. 492 (C.P. 1937). See notes 45-47, 68 *supra*.

²⁷⁸ *Bobilya v. Priddy*, 68 Ohio St. 373, 67 N.E. 736 (1903); *Hamill v. Wright*, 5 Ohio N.P. 9, 10, 8 Ohio Dec. (N.P.) 467 (1898).

²⁷⁹ *Holmes v. Gardner*, 50 Ohio St. 167, 33 N.E. 644 (1893).

against the grantee is available regardless of other property of the debtor,²⁸⁰ or of a remedy against a surety.²⁸¹

Section 9 of the Uniform Act provides:

Rights of Creditors Whose Claims Have Matured.—(1) Where a conveyance or obligation is fraudulent as to a creditor, such creditor, when his claim has matured, may, as against any person except a purchaser for fair consideration without knowledge of the fraud at the time of the purchase, or one who has derived title immediately or mediately from such a purchaser,²⁸²

(a) Have the conveyance set aside or obligation annulled to the extent necessary to satisfy his claim,²⁸³ or

(b) Disregard the conveyance and attach or levy execution upon the property conveyed.²⁸⁴

(2) A purchaser who without actual fraudulent intent has given less than a fair consideration for the conveyance or obligation, may retain the property or obligation as security for repayment.²⁸⁵

Under these provisions it has been held that a creditor or his representative²⁸⁶ must show that he has been prejudiced by the

²⁸⁰ Gormley v. Potter, 29 Ohio St. 597 (1876); Westerman v. Westerman, 25 Ohio St. 500 (1874). Goods and chattels must be exhausted first. OHIO GEN. CODE §11666 (1938); Gormley v. Potter, *supra*. Concerning actions by an executor under Ohio General Code Section 10510-49 see notes 43 and 274 *supra*.

²⁸¹ Vilas v. Christopher, 33 Ohio L. Rep. 589, 8 Ohio L. Abs. 521 (1930). Nor is an execution returned *nulla bona* necessary. *Ibid*.

²⁸² This is considered to include the transferee of either the fraudulent grantor or fraudulent grantee. Bryan v. Wilson, 171 Md. 421, 189 Atl. 220 (1937). See Nagel v. Farmers Exchange, 64 S.D. 363, 266 N.W. 722 (1936); Angers v. Sabatinelli, 235 Wis. 422, 293 N.W. 173 (1940). The protection afforded to a "purchaser for fair consideration without notice of the fraud" has been held to include an attaching creditor of the grantee. *In re Maxwell Sheraton, Inc.*, 46 F. Supp. 680 (S.D. N.Y. 1942), *aff'd sub nom.*, City of New York v. Johnson, 137 F. 2d 163 (C.C.A. 2d 1943). See Lowenthal v. Standard Oil Co. of N. Y., 114 N.J. Eq. 375, 168 Atl. 857 (Ch. 1933); 20 NOTRE DAME LAW. 438 (1945).

²⁸³ Healy-Owen-Hartzill Co. v. Montevideo Farmers & Merchants Elevator Co., 170 Minn. 290, 212 N.W. 455 (1927); Baker v. Penecost, 220 Tenn. 529, 106 S.E. 2d 220 (1937). As between the parties the conveyance is good. Brill v. Foshay Co., 65 F. 2d 420 (C.C.A. 8th 1933), *cert. denied*, 290 U.S. 643 (1933); Bankers Trust Co. v. Bank of Rockville Center Trust Co., 114 N.J. Eq. 391, 168 Atl. 733 (Ct. Err. & App. 1933); Marshall v. Marshall, 230 Wis. 504, 284 N.W. 541 (1939).

²⁸⁴ Doland v. Burns Lumber Co., 156 Minn. 238, 194 N.W. 636 (1923).

²⁸⁵ *In re Spotless Tavern Co.*, 4 F. Supp. 752 (D. Md. 1933); Merchants' Discount Co. v. Esther Abelson, Inc., 297 Mass. 517, 9 N.E. 2d. 528 (1937); People's Savings & Dime Bank & Trust Co. v. Scott, 303 Pa. 294, 154 Atl. 489 (1931). See 1 GLENN, *op. cit. supra* note 28, § 259.

²⁸⁶ Michal v. Adair, 66 Cal. App. 2d 382, 152 P. 2d 490 (1944); American Surety Co. v. Conner, 251 N.Y. 1, 177 N.E. 783 (1929).

transfer.²⁸⁷ Judgment and lien are not a prerequisite,²⁸⁸ but the claim must be matured, and the security of a secured creditor must be insufficient.²⁸⁹

In contrast with the remedies granted to the holder of a matured claim, the Statute of Elizabeth offered no aid to the holder of an unmatured one.²⁹⁰ In some states this defect has been corrected by legislation.²⁹¹ Section 10 of the Uniform Act meets the situation by providing that:

- Rights of Creditors Whose Claims Have Not Matured.
 —Where a conveyance made or obligation incurred is fraudulent as to a creditor whose claim has not matured he may proceed in a court of competent jurisdiction against any person against whom he could have proceeded had his claim matured, and the court may,
- (a) Restrain the defendant from disposing of his property,
 - (b) Appoint a receiver to take charge of the property,
 - (c) Set aside the conveyance or annul the obligation, or

²⁸⁷ *Brill v. Foshay Co.*, *supra* note 283; *Hemphill Co. v. Davis Knitting Co.*, 114 Pa. Super. 94, 173 Atl. 704 (1934).

²⁸⁸ *American Surety Co. v. Conner*, *supra* note 286; *Lind v. Johnson Co.*, 204 Minn. 30, 383 N.W. 661 (1938); *Virgil State Bank v. Wahl*, 56 S.D. 218, 228 N.W. 392 (1930); Glenn, *The Uniform Fraudulent Conveyance Act—Rights of Creditors without Judgment*, 30 COL. L. REV. 202 (1930); 29 COL. L. REV. 529 (1929); 42 HARV. L. REV. 832 (1929); 28 MICH. L. REV. 206 (1929). Cf. *Lyman v. Manger*, 185 Wis. 63, 200 N.W. 663 (1924). New Jersey changed the wording of the Uniform Act in this section so that it now reads in part, "When such creditor's claim is established according to law or is a lien upon the property covered by such conveyance or upon such obligation, [such creditor may] have the conveyance set aside or the obligation annulled to the extent necessary to satisfy his claim." Thus New Jersey has held that a judgment is required, but the bill will be retained and injunctive relief granted pending the determination of the amount of the claim. *Letitsky v. Wirzes*, 109 N.J. Eq. 25, 156 Atl. 272 (Ch. 1931); *Harder v. Harder*, 113 N.J. Eq. 540, 168 Atl. 61 (Ch. 1933). See *Ohio v. Clarke*, 129 N.J. Eq. 344, 19 A. 2d 893 (Ch. 1941) (action dismissed, no jurisdiction over principal debtor). The basis for the above change in New Jersey seems to be the separation of the law and equity courts, New Jersey having held the Act unconstitutional insofar as it attempts to authorize action to upset a conveyance without the existence of a lien. *Horstmann Co. v. Tothfuss*, 128 N.J. Eq. 168, 15 A. 2d 623 (Ct. Err & App. 1941); *Nield v. Norris*, 130 N.U. Eq. 53, 21 A. 2d 153 (Ch. 1941); 1 GLENN, *op. cit. supra* note 28, § 82.

²⁸⁹ See *Marshall & Elsley Bank v. Stepke*, 228 Wis. 39, 279 N.W. 625 (1938).

²⁹⁰ *Wiggins v. Armstrong*, 2 Johns. Ch. 144 (N.Y. 1816); *Price v. Engle*, 77 Ind. App. 439, 133 N.E. 755 (1922); *Kautz v. Sheridan*, 118 Me. 28, 105 Atl. 401 (1919); BIGELOW, *op. cit. supra* note 2, at 152.

²⁹¹ *E. g.* OHIO GEN. CODE §§ 11104-11106 (1938). Under Section 11104, when a conveyance is upset as fraudulent, all creditors, including those with unmatured claims, may share. See Note, 24 VA. L. REV. 795 (1938); 1 GLENN, *op. cit. supra* note 28, §§ 62, 78, 82.

- (d) Make any order which the circumstances of the case may require.²⁹²

Thus in Sections 9 and 10 the Act provides remedies for the holder of a matured or an unmatured claim, leaving to earlier sections the rights of present and subsequent creditors. Since the definition of a creditor in Section 1 includes the holder of an unliquidated, ex delicto claim, Sections 9 and 10²⁹³ are more inclusive than the Ohio statutes. Under Section 9 or 10 respectively, it is possible to join an action upon a matured or unmatured claim with one to set aside a fraudulent conveyance.²⁹⁴ Indeed, the inclusion of a tort claimant as a creditor under Section 1, the clarifying of a simple creditor's rights to sue in Sections 9 and 10,²⁹⁵ the provisions involving partnerships in Section 8, and the treatment of subsequent creditors in Sections 5, 6 and 7²⁹⁶ are seemingly the most important improvements which the Act has to offer in Ohio.

CONSTRUCTION AND KINDRED MATTERS

Section 12 of the Uniform Act provides that "This Act shall be so interpreted and construed as to effectuate its general purpose to make uniform²⁹⁷ the law of those states which adopt it." In this

²⁹² This seems to indicate that the action to be taken is within the discretion of the court. "The court may choose to go no further, until judgment in the first action, than to restrain the defendant from disposing of the property alleged to have been fraudulently conveyed, and appoint a receiver. It has the power to 'make any order which the circumstances of the case may require.'" *Herring-Curtiss Co. v. Curtiss*, 140 Misc. 857, 252 N.Y. Supp. 106 (Sup. Ct. 1931). *Re receiverships* see *Chapiro v. Wilgus*, 287 U.S. 348 (1932).

²⁹³ Although sections 9 and 10 are stated in terms of maturity or immaturity of the claim, the remedies of Section 10 seem to be available if the claim, though matured, is unliquidated. *Oliphant v. Moore*, 155 Tenn. 359, 293 S.W. 541 (1927) (malicious prosecutions); *Gatto v. Boyd*, 137 Misc. 156, 241 N.Y. Supp. 626 (Sup. Ct. 1930) (personal injuries); *McCann v. Oberle*, 33 Del. Co. 61 (Pa. 1945) (personal injuries).

²⁹⁴ *American Surety Co. v. Conner*, 251 N.Y. 1, 166 N.E. 783 (1929). For discussion of constitutional difficulties *re* jury trial, see note 288 *supra*. *Re* procedure under Federal Rule 18 b see 1 GLENN, *op. cit. supra* note 28, §§ 81, 82.

²⁹⁵ See note 273 *supra*.

²⁹⁶ The inclusion of subsequent creditors in sections 5 and 6 would probably be more a change in form than in substance.

²⁹⁷ Interpretations in other states are applicable. *State v. Brooks*, 181 Minn. 262, 232 N.W. 331 (1930); *In re Kellner's Estate*, 11 N.J. Misc. 201, 165 Atl. 585 (Surr. Ct. 1932); *New Amsterdam Casualty Co. v. Nadler*, 115 Ohio St. 472, 154 N.E. 736 (1926). See Kerr, *Nature and Interpretation of Uniform State Laws*, 55 AM. L. REV. 105, 107 (1921); Sickerman, *Construction of Clause in Uniform State Laws Providing for Uniformity of Interpretation*, 2 A.B.A.J. 60 (1916). But this doctrine has limits. *In re Frey*, 15 F. 2d 871 (Minn. 1926); *Blumenthal v. Blumenthal*, 303 Mass. 275, 21 N.E. 2d 244 (1939).

connection the Commissioners' statement should be recalled: "In most states the bill if enacted will not so much change the law as clearly define what heretofore has been indefinite."²⁹⁸ Despite alteration in form the Act is mainly a modernized Statute of 13 Elizabeth,²⁹⁹ proposed in order "to remove some confusion of legal thought" and to substitute therefor "rules both certain and uniform"³⁰⁰—objectives not unworthy, however sanguine. Since its purpose is remedial,³⁰¹ its construction should be liberal.³⁰²

Further to insure that enactment of the Uniform Act will not disturb established rules, Section 11 directs that: "In any case not provided for in this Act the rules of law and equity including the law merchant, and in particular the rules relating to the law of principal and agent, and the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy or other invalidating cause shall govern."³⁰³

This provision was said to preserve existing doctrine³⁰⁴ when a grantor was defrauded of property by his grantee,³⁰⁵ and was applied

²⁹⁸ 9 UNIFORM LAWS ANN. PREFATORY NOTE 326 (1938).

²⁹⁹ See note 11 *supra*.

³⁰⁰ See note 12 *supra*.

³⁰¹ *Hearn 45 St. Corp. v. Jano*, 283 N.Y. 139, 27 N.E. 2d 814 (1940); *Lind v. Johnson Co.*, 204 Minn. 30 282 N.W. 661 (1939). See *Angers v. Sabatinelli*, 235 Wis. 423, 293 N.W. 173 (1940).

³⁰² *American Surety Co. v. Conner*, 225 App. Div. 137, 232 N.Y. Supp. 94, *rev'd on other grounds*, 251 N.Y. 1, 166 N.E. 785 (1929). "The latter [the Uniform Act] is very much like a document under the parole evidence rule; so long as you do not contradict anything it says, you should be permitted to suggest various points which it has not covered." 1 GLENN, *op. cit. supra* note 28, at 564-565.

³⁰³ *Shapiro v. Wilgus*, 287 U.S. 348 (1932); *In re Frey*, *supra* note 297; *Blumenthal v. Blumenthal*, *supra* note 297; *Golder v. Gogash*, 325 Pa. 449, 188 Atl. 837 (1937).

³⁰⁴ "Although the doctrine of fraudulent retention of possession has been developed historically in connection with the Statute of Elizabeth, it has become a separate body of law with a great diversity of rules in the various jurisdictions. Any attempt to treat this question would probably have unduly impeded the adoption of the Uniform Act. At any rate, it seems to be assumed without exception that conveyances may stand or fall according to the local law of fraudulent retention of possession without reference to the Fraudulent Conveyance Act." McLaughlin, *Application of the Uniform Fraudulent Conveyance Act*, 46 HARV. L. REV. 404, 405 (1933).

³⁰⁵ As between the parties, the "clean hands" doctrine usually prevents the grantor of a fraudulent conveyance from recovering from the grantee. *Asher v. Asher*, 278 Ky. 802, 129 S.W. 2d 552 (1939). However, when the grantee was the primary moving party the grantor has been allowed to recover. *Asher v. Asher*, *supra*; or when no injury has come to the creditors of the grantor. *Zak v. Zak*, 305 Mass. 194, 25 N.E. 2d 169 (1940) (allowed recovery on the basis that the grantor did not have to rely upon the fraud to show his claim against the grantee); 44 YALE L. J. 173 (1934); 24 MINN. L. REV. 872 (1940). See *Severn v. Boylan*, 75 Ohio App. 15, 60 N.E. 2d 251

in the second federal circuit to an assignment of book accounts.³⁰⁶ The Act is cumulative.³⁰⁷ It prescribes no exclusive course of procedure.³⁰⁸ Ordinary statutes of limitations are applicable.³⁰⁹ And even though a judgment is no longer necessary,³¹⁰ on the cumulative theory it has been held that limitations run from the date of judgment, if that was the law under previous statutes.³¹¹

Further to be considered upon adoption of the Act would be its effect on existing legislation. Section 14³¹² provides the vehicle for specific repeal, including the provision that "all acts or parts of acts inconsistent with this Act are hereby repealed." As a precautionary measure some states have specifically reserved from repeal certain sections of their codes.³¹³

If the Ohio Legislature should adopt the Uniform Act, Section 8618³¹⁴ of the Code should be directly repealed. In addition it might

(1944); *Schmelz v. Michelson*, 8 Ohio Dec. Rep. 538 (1882); 1 GLENN, *op. cit. supra* note 28, § 119. Rule extended to creditor of grantee. *California Conserving Co. v. D'Avenzo*, 62 F. 2d 528 (C.C.A. 2d 1933). This doctrine apparently is not changed by the Uniform Act. *In re Baltimore Shoe House*, 20 F. 2d 134 (D. Md. 1927); *In re Krauss & Co.*, 2 F. 2d 999 (W. D. Tenn. 1924).

³⁰⁶ *Lee v. State Bank & Trust Co.*, 54 F. 2d 518 (C.C.A. 2d 1931); 18 VA. L. REV. 799 (1932); 41 YALE L. J. 924 (1932). See *Irving Trust Co. v. Finance Service Co.*, 63 F. 2d 694 (C.C.A. 2d 1933); *In re DeLuxe Oil Co.*, 36 F. Supp. 287 (D. Minn. 1940); 4 COLLIER, *op. cit. supra* note 10, § 70.77.

³⁰⁷ *Simon v. Sorrentino*, 145 Pa. Super. 364, 20 A. 2d 805 (1941).

³⁰⁸ *Schline v. Kine*, 301 Pa. 586, 152 Atl. 845 (1930); *Citizen's State Bank v. Carda*, 47 S.D. 29, 195 N.W. 828 (1923); *Lind v. Johnson Co.*, *supra* note 301; *Conemaugh Iron Works Co. v. Delano*, 298 Pa. 182, 148 Atl. 94 (1929); *Lipsky v. Voloshen*, 155 Md. 139, 141 Atl. 402 (1928).

³⁰⁹ 1 GLENN, *op. cit. supra* note 28, § 88. New York uses different rules for actual and legal fraud. In the former, the statutory period is six years from the discovery of the fraud; in the latter the period is ten years from the conveyance. *Hearn 45 St. Corp. v. Jane*, *supra* note 301; *Buttles v. Smith*, 281 N.Y. 226, 22 N.E. 2d 350 (1939). Ohio has a limitation of four years, running from date of discovery of the fraud. OHIO GEN. CODE § 11224; *Stevens v. Summers*, 68 Ohio St. 421, 67 N.E. 884 (1903); *Gombs v. Watson*, 32 Ohio St. 228 (1877).

³¹⁰ Note 288 *supra*.

³¹¹ With the adoption of the Uniform Act, it would seem that the statute would begin to run either upon the discovery of the fraud or from date of the conveyance; but Minnesota in *Lind v. Johnson Co.*, *supra* note 301, held that when a creditor proceeds to judgment before suing to set aside, the statute begins to run when the judgment is rendered.

³¹² Section 13 merely states, "This act may be cited as the Uniform Fraudulent Conveyance Act."

³¹³ E.g. Md., Minn., Pa. See *McLaughlin, Application of the Uniform Fraudulent Conveyance Act*. 46 HARV. L. REV. 404 (1933).

³¹⁴ Minnesota specifically repealed section 7013, the equivalent of Ohio General Code Section 8618, yet allowed a creditor to obtain judgment and then sue to set aside the conveyance, just as he could have done under the previous statute. The court said that the Uniform Act did not upset the

be advisable expressly to reserve Sections 11092 through 11145. This would avoid any ambiguity regarding the effect of the Act upon the law of assignments for creditors, discussed earlier.³¹⁵ It would include the Bulk Sales Act,³¹⁶ which by construction would probably be preserved in any event. And it would relieve any doubt regarding the retention of Sections 11104 through 11107, with their treatment of preferences as well as of fraudulent conveyances. As a precaution Sections 8404 to 8408 and 8414 of the Sales Act, relating to retention of possession and to transfers of title—although probably beyond the strict scope of the Act³¹⁷—and Section 8617³¹⁸ could also be specifically reserved.

On the other hand provisions of the insurance code relating to distribution of proceeds from insurance policies procured in fraud of creditors (9400) and to exemptions (9394) would seem to be sufficiently reserved under Section 11 without special mention in Section 14.³¹⁹ The same would appear to be true of Sections 10502-6, relative to dower rights in property conveyed in fraud of a spouse,³²⁰ and 10510-49 and -50,³²¹ which authorize an executor or administrator

remedies available before adoption, since the Uniform Act did not contain all the law on the subject. *Lind v. Johnson Co.*, *supra* note 301. Utah retained section 33-1-8, similar to Ohio General Code Section 8618.

³¹⁵ Notes 23-26 *supra*.

³¹⁶ OHIO GEN. CODE §§ 11102-11103-1. See McLLaughlin, *Application of the Uniform Fraudulent Conveyance Act*, 46 HARV. L. REV. 404, 405 (1933), which points out that Del., Mich., N. J., Tenn., Wis., and Wyo. all assumed the acts to be consistent; Minn. and Md. expressly saved the Bulk Sales Act; Pennsylvania, in *Miller v. Myers*, 300 Pa. 192, 150 Atl. 588 (1930), held the acts were consistent.

³¹⁷ See 1 GLENN, *op. cit. supra* note 28, §349; BANKR. ACT § 60; 24 MINN. L. REV. 832, 844 (1940). "In many of the States in this country there are statutory provisions covering the matter, and in all the older states the law is well settled, and it would be hard to bring about a change. For this reason it seemed best to the Commissioners for Uniform State Laws in considering this subject, not to attempt to make a uniform rule as to what constitutes fraud, but to leave the matter to the law of each state. When the existing local law determines what constitutes fraud this section of the Sales Act provides the consequences which follow." WILLISTON, SALES § 351 (2d ed. 1924).

³¹⁸ 8 Ohio Laws 216 § 1 (1810), REV. STAT. § 4195 (1880) (which with section 8618 formed subsections 1 and 2 of the Statute of Frauds).

³¹⁹ *United States v. Bleser*, 34 F. Supp. 653 (D. Wis. 1940); *Equitable Life Assurance Society of the United States v. Hitchcock*, 270 Mich. 72, 258 N.W. 214 (1935); *Potter Title & Trust Co. v. Fidelity Trust Co.*, 316 Pa. 316, 175 Atl. 400 (1934); *First Wisconsin National Bank v. Roehling*, 224 Wis. 316, 269 N.W. 677 (1936); 26 HARV. L. REV. 362 (1912); 25 VA. L. REV. 588 (1939).

³²⁰ See *Dick v. Bauman*, 73 Ohio App. 107, 55 N.E. 2d 137 (1943).

³²¹ The Ohio statutes are collected note 6 *supra*.

under certain conditions to set aside fraudulent conveyances.³²²

³²² A repealer section might cover the following points:

14. Inconsistent Legislation Repealed. Section 8618 of the General Code is hereby repealed, and all sections or parts of sections of the General Code which are inconsistent with this act are hereby repealed; but sections 8404, 8405, 8406, 8617, and 11092 to 11145, inclusive, are not repealed.

Previous suggestions relating to restrictions in defining a conveyance (note 31 *supra*) and insolvency (note 101 *supra*) should be recalled. New York provided specifically, "This act shall not affect any action or proceeding now pending in any court." Laws 1925, c. 254, sec. 1. Ohio General Code Sections 11104-11106, as originally enacted in 1859, were held to be retroactive. *Stanton v. Sheldon & Co. v. Keyes*, 14 Ohio St. 443 (1863).